No. 11-20-00009-CV

In the Court of Appeals for the Eleventh District of Texas, at Eastland

KINDER MORGAN SACROC, LP, KINDER MORGAN CO_2 CO., LP, KINDER MORGAN PRODUCTION CO., L.P., and KINDER MORGAN PRODUCTION CO., LLC,
Appellants,
v.
SCURRY COUNTY, SNYDER INDEPENDENT SCHOOL DISTRICT, SCURRY COUNTY JUNIOR COLLEGE DISTRICT d/b/a WESTERN TEXAS COLLEGE; SCURRY COUNTY HOSPITAL DISTRICT d/b/a COGDELL MEMORIAL HOSPITAL,
Appellees.

On Appeal from the 132nd Judicial District Court Scurry County, Texas
Cause No. 26719; Hon. Ernie B. Armstrong, Presiding

BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED **February 18, 2020**

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Appellees

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Snyder Independent School District
Scurry County Junior College District d/b/a Western Texas College
Scurry County Hospital District d/b/a Cogdell Memorial Hospital

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The Trial Court

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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents an important subject-matter jurisdictional issue that arises in multiple, ongoing cases in which various taxing units have attempted to increase Kinder Morgan's ad valorem tax liability in administrative proceedings before county appraisal review boards ("ARBs") and on appeal from the ARBs' administrative decisions. In a suit nearly identical to this one, on February 6, 2020, the 83rd Judicial District Court of Pecos County dismissed, with prejudice, a taxing unit's suit against Kinder Morgan because the taxing unit had not timely perfected its appeal from the ARB's administrative decision. The same jurisdictional defect exists in this Taxing Units' suit filed in Scurry County. Oral argument would assist the Court in resolving this important jurisdictional issue, especially because Kinder Morgan is raising this issue of subject-matter jurisdiction for the first time on appeal. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex. 2012) (party can raise new jurisdictional challenge in interlocutory appeal).

This appeal also presents a new issue arising under the recent amendments to the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et. seq.*—namely, whether the Taxing Units' statutory claims are exempt from the TCPA under the recently enacted exemption for legal actions "based on a common law fraud claim." Tex. Civ. Prac. & Rem. Code § 27.010(a)(12). Kinder Morgan believes that oral argument will aid the Court in deciding this legal question.

RECORD REFERENCES

Appellants Kinder Morgan SACROC, LP, Kinder Morgan CO2 Co., LP, Kinder Morgan Production Co., LP, and Kinder Morgan Production Co., LLC, will use the following citation formats when referencing the record:

Source	Citation Format
Reporter's Record (volume and page)	[volume]RR[page]
Clerk's Record	CR[page]
Appendix to Brief of Appellant	App-[letter]

STATEMENT OF THE CASE

Nature of the Case: The underlying case involves a real property tax dispute.

Parties: Plaintiffs and Appellees are Scurry County; Snyder Independent School District; Scurry County Junior College d/b/a/ Western Texas College; and Scurry County Hospital d/b/a Cogdell Memorial Hospital ("Taxing Units").

Defendants and Appellants are Kinder Morgan CO_2 Co., LP; Kinder Morgan Production Co., LLC, Individually and as Successors in Interest to Kinder Morgan SACROC, LP and Kinder Morgan Production Co., LP ("Kinder Morgan").

Trial Court: The Honorable Ernie B. Armstrong, Judge of the 132nd Judicial District Court, Scurry County, Texas.

Course of Proceedings: The Taxing Units filed claims under the Tax Code alleging Kinder Morgan caused its property to be excluded and omitted from appraisal. CR9-10. Because these allegations fall squarely within the TCPA, Kinder Morgan filed a TCPA Motion to Dismiss.

Trial Court's Disposition: This is an appeal from the trial court's order, signed December 11, 2019, denying Kinder Morgan's TCPA Motion to Dismiss based on the trial court's granting, in part, of the Taxing Units' Motion to Strike Kinder Morgan's TCPA Motion to Dismiss on grounds that the Taxing Units' legal action was exempted from the TCPA.

ISSUES PRESENTED

1. Whether the Court should render judgment dismissing this case for lack of subject-matter jurisdiction because the Taxing Units did not timely perfect their appeals from the appraisal review board's administrative decision.

2. Alternatively, whether the trial court erred in denying Kinder Morgan's TCPA Motion to Dismiss, and whether the trial court erred in concluding that the Taxing Units' statutory claims (brought under the Texas Tax Code) are exempted from the TCPA as a "legal action based on a common law fraud claim." *See* Tex. Civ. Prac. & Rem. Code § 27.010(a)(12) (emphasis added).

INTRODUCTION

The posture of this case has shifted dramatically since the trial court's ruling on Kinder Morgan's TCPA Motion to Dismiss on December 11, 2019. In December 2019 and January 2020, Kinder Morgan (defendant/appellant) consulted with government regulators and Mr. Brent Lemon, counsel for the Taxing Units (plaintiffs/appellees), and learned that the Taxing Units did not have legal authority to engage Mr. Lemon as they have purported to do in this case—*i.e.*, to engage Mr. Lemon on a contingent-fee basis to attempt to raise Kinder Morgan's tax liability by contending, before appraisal review boards ("ARBs") and courts, that Kinder Morgan's mineral interest property was omitted from the tax rolls and has therefore escaped taxation. This type of engagement is known as a "tax-ferret" engagement and is not authorized by Texas law.

In a separate, but nearly identical proceeding filed against Kinder Morgan in Pecos County by another taxing unit with the same counsel (Mr. Lemon), Kinder Morgan and the Pecos County Appraisal District ("PCAD") filed a Joint Motion to Show Authority and Plea to the Jurisdiction on January 24, 2020. That motion was granted on February 6, 2020, and the case was dismissed for lack of subject-matter jurisdiction. In that case, the trial court concluded that because the taxing unit did not have the authority to engage Mr. Lemon as a tax ferret, the taxing unit's administrative appeal of the ARB's decision to district court (an appeal pursued by

Mr. Lemon) was void. The court therefore concluded that the taxing unit's appeal to district court was not timely perfected, such that the district court had no jurisdiction.

The jurisdictional defect that required dismissal of the taxing unit's Pecos County action also arises in this case from Scurry County. Kinder Morgan therefore brings this jurisdictional issue to this Court on this interlocutory appeal.

Kinder Morgan also appeals the trial court's interlocutory order denying Kinder Morgan's TCPA Motion to Dismiss. As explained in this brief, the trial court erred in concluding that the Taxing Units' statutory claims under the Texas Tax Code are exempted from the TCPA as "a legal action based on a common law fraud claim." Tex. Civ. Prac. & Rem. Code § 27.010(a)(12) (emphasis added).

STATEMENT OF FACTS

I. This Case Is an Administrative Appeal from the Scurry County Appraisal Review Board's Denial of the Taxing Units' Challenge Petitions.

A. The Taxing Units Purported To Appeal the Appraisal Review Board's Decision to District Court.

Under the Tax Code, when an appraisal review board ("ARB") denies a taxing unit's Challenge Petition, the taxing unit may appeal the ARB's denial in district court. Tex. Tax. Code § 42.031(a). Any appeal must be filed "within 60 days after the [taxing unit] received notice that a final order has been entered." Tex. Tax. Code § 42.21, § 42.031. The 60-day deadline to appeal is jurisdictional. Tex. Tax. Code § 42.21; *Appraisal Review Bd. v. International Church of Foursquare Gospel*, 719 S.W.2d 160, 160 (Tex. 1986) (per curiam).

Purporting to represent the Taxing Units, Mr. Lemon filed a Petition for Review and Writ of Mandamus (2019) ("Original Petition") on September 12, 2019 in an attempt to appeal the ARB's denial of the Taxing Units' Challenge Petitions. App-(C); CR6. That Original Petition was filed within 60 days of the ARB's decision, but as explained below, in a case nearly identical to this one, a court in Pecos County held that a taxing unit did not timely appeal an ARB decision because the taxing unit's purported appeal was prosecuted by Mr. Brent Lemon under a tax-ferret engagement that is prohibited by Texas law and therefore void. *Infra*, p. 5.

B. Kinder Morgan Moved To Dismiss Under the TCPA.

Less than a month after service, Kinder Morgan filed its TCPA Motion to Dismiss asserting that the Taxing Units' statutory "omission of property" claim implicated Kinder Morgan's right to free speech and right to petition because the Taxing Units' allegations focused on Kinder Morgan's speech to governmental entities as part of the appraisal process. CR49-55. In its Motion, Kinder Morgan noted that a recent amendment to the TCPA (in 2019) added an exemption for "a legal action based on a common law fraud claim." CR55; App-(C),Tex. Civ. Prac. & Rem. Code § 27.010(a)(12). Kinder Morgan stated that the exemption was inapplicable because the Taxing Units had asserted only statutory claims under the Tax Code, not a common law fraud claim. CR55.

C. The Trial Court Concluded the Taxing Units' Claim Is Exempted From the TCPA as a Claim for Common Law Fraud.

At the Taxing Units' request, Kinder Morgan agreed to bifurcate the TCPA process, with a first hearing dedicated to whether the TCPA applies to the Taxing Units' claim. CR399-400. At a hearing on December 2, 2019, counsel for the Taxing Units argued only that that the Taxing Units' claim is exempted from the TCPA because it is based on common law fraud. 2RR124:5-129:22. Counsel for Kinder Morgan responded by explaining that the exemption applies only to common law fraud claims, citing two principal reasons: (1) the use of "common law fraud" in the exemption means the Legislature intended to exclude statutory claims and

(2) the use of the word "claim" in the exemption means the Legislature meant for the exemption to apply only to common law fraud claims, not statutory claims based on a factual theory involving fraudulent conduct. 2RR130:2-131:18.

The trial court ruled that the TCPA did not apply because the "exemption and the filing of this suit after September 1 means this suit, in my opinion, my ruling, is exempt from the TCPA application." 2RR135:7-9. On December 11, 2019, the trial court signed an order granting in part the Taxing Units' Motion to Strike, "and as a result, Kinder Morgan's TCPA Motion to Dismiss is DENIED." App-(A). All other relief requested in the Motion to Strike was denied. App-(A). This appeal by Kinder Morgan followed. CR514, 526.

II. After Kinder Morgan Filed This Appeal, a Court in Pecos County Dismissed, for Lack of Subject-Matter Jurisdiction, a Suit That Mr. Lemon Was Purporting To Prosecute on Behalf of a Taxing Unit.

In December 2019, counsel for Kinder Morgan became aware of potential issues regarding Mr. Lemon's authority to represent his Taxing Unit clients. Specifically, Kinder Morgan became aware that Mr. Lemon's taxing unit clients—in this case and in Pecos County—had engaged him as a contingent-fee tax ferret without the express or implied authority to do so. A contingent-fee tax ferret is a "private entity [who] contracts with a taxing unit to locate property omitted from the tax rolls" and receives, as compensation for his services, a percentage of all tax revenues generated by the tax ferret. Tex. Att'y Gen. Op. JC-0290, 2000 WL

1515207, at *2. Without some express grant of authority from another source, Taxing Units do not have the express or implied authority to hire tax ferrets. *Id.* at *4.

In response to requests from Kinder Morgan's counsel regarding the source of authority for his engagement, Mr. Lemon provided engagement letters that purported to grant him authority to represent the Taxing Units on a contingent fee basis. App-(D), Ex. 1, Letter from Brent Lemon Dated January 3, 2020.

When Kinder Morgan responded by specifically asking for support for his clients' authority to engage him on a contingent fee, Mr. Lemon did not supply any additional authority, apparently relying solely on the engagement letters. App-(D), Ex. 2, Letter from Kinder Morgan Counsel Dated January 7, 2020 at 2; Ex. 3, Letter from Brent Lemon Dated January 9, 2020. In response to Mr. Lemon's inability to support his clients' authority to engage him, Kinder Morgan, acting jointly with the Pecos County Appraisal District, filed a Motion to Show Authority and Plea to the Jurisdiction in the 83rd Judicial District Court of Pecos County. App-(D), Ex. 4, Motion to Show Authority and Plea to the Jurisdiction.

After a hearing, that court held that Mr. Lemon was disqualified from the cause and dismissed the Pecos taxing unit's suit against Kinder Morgan for lack of subject-matter jurisdiction. App-(D), Ex. 5, Order Granting Kinder Morgan's and Pecos County Appraisal District's Motion to Show Authority and Plea to the

Jurisdiction [hereinafter Pecos Order]. The case was dismissed based on Kinder Morgan's Plea to the Jurisdiction, in which Kinder Morgan argued that the taxing unit in that case had not validly appealed the ARB's denial of its challenge petition because its engagement of Mr. Lemon was void. Given the identical nature of Mr. Lemon's representative capacity and the identical claims by the Scurry County Taxing Units in this case, Kinder Morgan now raises this jurisdictional defect on appeal here.

SUMMARY OF THE ARGUMENT

As governmental entities, the Taxing Units can exercise only those powers that the Legislature has expressly or impliedly conferred upon them. Actions taken by a taxing unit without legislative authorization are void. *See, e.g.*, *Harris County Hospital v. Alief Independent School District*, 1992 WL 43927, at *2 (Tex. App.—Houston [14th Dist.] March 5, 1992, writ denied) (school district's action taken without authority was void).

The powers given to taxing units by the Legislature do not include the power to enter into a tax-ferret contract—*i.e.*, to hire a private party to pursue property that has escaped taxation, where that private party is paid a percentage of tax revenues as compensation for its services. Since any action taken by a governmental entity without express or implied authority is void, Mr. Lemon's engagement—and any actions taken by him in the name of his clients—are void and of no effect. This necessarily means that the taxing units have not complied with the Tax Code's jurisdictional prerequisites and deadlines for a valid appeal of the ARB's denial of their challenge petition. *See* App-(D), Ex. 5, Pecos Order.

The contract between the Taxing Units and Mr. Lemon is clear: for his services, Mr. Lemon receives, as payment, a portion of any tax revenues he generates. Mr. Lemon is acting as a tax ferret because his engagement necessarily

includes pursuing allegedly omitted property in exchange for a portion of tax revenues generated by his efforts.

The Taxing Units have no authority to enter into a contingent-fee tax-ferret contract and no authority to appeal an ARB decision by such a contract. The Taxing Units' claims should be dismissed for lack of jurisdiction because the Taxing Units' appeal was prosecuted without Legislative authority and is therefore void.

And even if the court had jurisdiction, the trial court here erred in denying Kinder Morgan's TCPA Motion to Dismiss. The TCPA is designed to protect citizens' rights to speak freely and participate in government to the maximum extent permitted by law. Kinder Morgan—like every Texas property owner—has the right to communicate with and participate in government by voluntarily providing its confidential tax information to the Scurry County Appraisal District for property tax assessment purposes. It is this voluntary communication that the Taxing Units allege was fraudulent. Baseless taxing unit challenges like this one squelch taxpayers' exercise of their most basic rights—to communicate with, and participate in, government.

The recently enacted exemptions to the TCPA provide no refuge for the Taxing Units' claim. Added in September 2019, Exemption 12 precludes the dismissal of "legal actions based on a common law fraud claim." Tex. Civ. Prac. & Rem. Code § 27.010(a)(12) (emphasis added). This Court already held that the very

statutory claims here—arising under the Tax Code—do not amount to "an independent common law fraud claim." *Kinder Morgan SACROC, LP v. Scurry County*, 589 S.W.3d 889, 900 (Tex. App.—Eastland 2019, pet. filed) (emphasis added). Exemption 12 of the TCPA does not apply here because the Taxing Units' claims under the Tax Code are statutory claims, not common-law claims.

Despite their acknowledgment that they assert only statutory claims under the Tax Code, the Taxing Units contend their claims should not be dismissed because they must prove elements of a common law fraud claim to prevail on their statutory Tax Code claims. The only reasonable interpretation of the full text of the statute is that Exemption 12 exempts, from the TCPA, only "common law fraud claim[s]"—not statutory claims. Because the TCPA applies and the Taxing Units' claim is not protected by Exemption 12, the Taxing Units' claim is subject to the TCPA.

ARGUMENT

I. This Entire Case Should Be Dismissed for Lack of Subject-Matter Jurisdiction: The Taxing Units' Petition Is Void, so the Taxing Units Did Not Timely Appeal the ARB's Decision.[1]

A. The Taxing Units Did Not Timely Appeal the ARB's Denial of Their Challenge Petitions.

Under Tax Code § 42.21, a taxing unit may appeal an ARB decision by "fil[ing] a petition for review with the district court within 60 days after the [taxing unit] received notice that a final order has been entered." Tex. Tax. Code § 42.21, § 42.031. Section 42.21 provides that "[f]ailure to timely file a petition bars any appeal." Tex. Tax. Code § 42.21. "Compliance with § 42.21 is jurisdictional." *Appraisal Review Bd. v. International Church of Foursquare Gospel*, 719 S.W.2d 160, 160 (Tex. 1986) (per curiam). Thus, failure to file a petition within the time allowed by statute deprives the district court of jurisdiction. *Id.*; *Koll Bren Fund VI, LP v. Harris County Appraisal Dist.*, 2008 WL 525799, at *4 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

[1] Kinder Morgan did not raise this jurisdictional challenge in the trial court. Although the scope of interlocutory appellate review is normally limited to the matters decided in the interlocutory order being appealed, a party may raise a new challenge to subject-matter jurisdiction for the first time on interlocutory appeal. *Rusk State Hosp. v. Black*. 392 S.W.3d 88 (Tex. 2012). Further, this Court may consider documents submitted by the parties that are outside the record for the purpose of determining its own jurisdiction. Tex. Gov't Code § 22.220(c); *see Greeheyco, Inc. v. Brown*, 565 S.W.3d 309, 325 (Tex. App.—Eastland 2018, no pet.) (op. on mtn. for rehearing); *Harlow Land Co., Ltd. v. City of Melissa*, 314 S.W.3d 713, 716 n.4 (Tex. App.—Dallas 2010, no pet.).

Here, Mr. Lemon purported to appeal the ARB's decision on behalf of the Taxing Units within the statutory, 60-day timeline, but as explained below, Mr. Lemon lacked the authority to act on behalf of the Taxing Units because the Taxing Units had no authority to enter into a tax-ferret engagement. Mr. Lemon's engagement letters are void, and he has no authority to act on behalf of the Taxing Units. *See Alief*, 1992 WL 43927, at *2 (school district's act taken without authority is void); *Benavides Independent School District v. Guerra*, 681 S.W.2d 246, 254 (Tex. App.—San Antonio 1984) (writ ref'd r.r.e.) (same).

B. Texas Law Does Not Authorize a Taxing Unit To Enter Into a Tax-Ferret Engagement.

Government entities have only those authorities that are granted to them by the Legislature or the Constitution. The Texas Constitution authorizes the Legislature to establish "the manner in which and the situations under which a [] political subdivision may compensate a public contractor under a contingent fee contract for legal services" (Tex. Gov't Code § 2254.102), but the Legislature has not authorized a public entity to enter into a contingent-fee, tax-ferret engagement with a private party.

Despite multiple requests to show his authority to represent the Taxing Units, Mr. Lemon was unable to identify any statute or case granting the Taxing Units the authority—whether express or implied—to hire a private lawyer on a contingent-fee basis to search for new property to add to the tax rolls. Indeed, the Pecos County

District Court held on February 6, 2020 that the same engagement letter used in this case by Mr. Lemon "failed to establish sufficient authority to prosecute" an almost identical suit on behalf of Iraan-Sheffield Independent School District. App-(D), Ex. 5, Pecos Order.

1. Attorney General Cornyn's Opinion Concludes That Taxing Units Do Not Have Authority—Express or Implied—To Hire a Contingent-Fee Tax Ferret.

In 2000, then-Attorney General John Cornyn issued an opinion concluding that contingent-fee, tax-ferret agreements—wherein a taxing unit deputizes a private person to search for additional tax revenue on a contingent-fee basis—are not allowed under Texas law and violate Texas public policy. Tex. Att'y Gen. Op. JC-0290, 2000 WL 1515207, at *2. His opinion concluded that taxing units could only enter into such an agreement with express or implied statutory authority. *Id.* at *4. After analyzing the history of tax-ferret contracts in Texas and the intent expressed by the Legislature in passing relevant statutes, Attorney General Cornyn concluded that no statute provides taxing units with the express authority to enter into a tax-ferret agreement and that such authority "should not be implied." *Id.* at *5.

Attorney General Cornyn explained that such authority cannot be implied because the Legislature "closely regulate[s] contingent fee contracts involving taxing units." *Id.* at *3. In support of his conclusion, the Attorney General traced the Legislature's regulation of such contingent-fee contracts to the 1920s, when there

was significant public outrage against tax ferrets. These engagements "shocked the public conscience as being unfair and exorbitant," and were considered "unfair and unjust to the public" by the Legislature. *Id.* (citing *White v. McGill*, 114 S.W.2d 860, 862 (Tex. 1938)). As General Cornyn's opinion explains, the Legislature "desired that such evils should be stopped," *id.* (*citing White*, 114 S.W.2d at 863), and it did so by enacting civil articles that were interpreted by courts as imposing a 15% fee cap on tax-ferret engagements and requiring both Attorney General and Comptroller approval for each new agreement.

Attorney General Cornyn's opinion points out that the Legislature had spoken "on the issue of contingent fee contracts involving governmental entities as recently as 1999." *Id.* In those amendments, the Legislature allowed certain governmental entities to enter into contingent-fee agreements, subject to a long list of procedural steps and safeguards. *Id.* (citing Tex. Gov't Code § 2254.103(a)-(c) (Vernon 2000)). Much like the tax ferret statutes from the 1930s and Tax Code § 6.30, the Government Code provisions capped the allowable compensation, and those provisions also imposed detailed requirements on the process for entering into such a contingent-fee contract, including:

- an obligation that the governmental entity prove that there is a substantial need for legal services, that the engagement could not be handled by a government attorney, and that a private attorney cannot be retained on an hourly basis;

- a requirement that contracts involving an expected recovery greater than $100,000 be submitted to the Legislative Budget Board;
- a provision requiring contract language that establishes "a reasonable hourly rate," not to exceed $1,000 and a "base fee" to be calculated by multiplying the hourly rate by the hours worked for each time keeper;
- a requirement that the contract determine a "multiplier" between 0 and 4 that is applied to the "base fee" to set a ceiling for the total recovery allowed without approval from the Legislature;
- a restriction on the size of the "multiplier" and of the maximum percentage of any recovery, absent approval from the Legislature.

Tex. Gov't Code §§ 2254.103(d)-(e), 106(b)-(c). As of the time Attorney General Cornyn issued his opinion, these sections only authorized contingent-fee engagements by certain state-wide entities and did not empower taxing units to enter into agreements covered by the section.

After outlining all the above statutes and the express authority they conferred on certain governmental entities to engage in highly-regulated contingent-fee agreements, Attorney General Cornyn concluded that "[n]o similar statute authorizes a taxing unit to enter a contingent fee, tax ferret contract." Tex. Att'y Gen. Op. JC-0290, 2000 WL 1515207, at *4. Thus, the Attorney General reached his bottom-line conclusion:

> We conclude that, without express authority, no taxing unit . . . may enter a contingent fee, tax ferret contract. . . In light of the legislative policy against a taxing unit entering a contingent fee contract, authority to do so should not be implied. Because there is no such express authority, a taxing unit may not enter a contingent fee, tax ferret contract.

Id.

2. No Statute Expressly Gives the Taxing Units the Authority To Hire an Attorney To Bring a Tax-Ferret Case on a Contingent-Fee Basis.

There is no authority in Texas law authorizing the Taxing Units to pursue escaped property through a tax-ferret engagement. And here, there is no dispute that the Taxing Units have attempted to hire Mr. Lemon as a tax ferret. In other words, the Taxing Units have attempted to hire Mr. Lemon to pursue a claim based on the alleged omission of Kinder Morgan's property from the Scurry County tax rolls, where Mr. Lemon is compensated, on a contingent-fee basis, with 20 percent of any tax revenue generated from his efforts, plus expenses. App-(D), Ex. 1, Letter from Brent Lemon Dated January 3, 2020, at Contracts for Employment.

There can also be no dispute that taxing units, like Snyder ISD, can only do things that the Legislature or Constitution gives them authority to do. School districts "can act only in accordance with statutory authority." *Alief*, 1992 WL 43927, at *2. "Where a school board acts without express or implied statutory authority or in contravention of a statute, then its act is void." *Guerra*, 681 S.W.2d at 254. For example, a Harris County district court voided a contingent-fee agreement between Harris County and a private firm because the agreement had been executed in contravention of a statute requiring Comptroller approval. *International Paper Co.*

v. Harris County, 445 S.W.3d 379, 383-84 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

Additionally, the taxing unit Scurry County was expressly prohibited from hiring an attorney using a contingent-fee agreement without express approval from the state comptroller at the time Mr. Lemon's engagement letter was signed. In 2007, the Legislature expanded the scope of the Government Code provisions regulating contingent fee agreements by expressly authorizing certain political subdivisions, including counties, to enter into contingent fee contracts subject to the same restrictions and approvals enumerated for state entities. Tex. Gov't Code § 403.0305 (West 2007); *see supra* Section I.B.1 (discussing restrictions and approvals for state entities to enter into contingent-fee agreements). This change remained in place through September 1, 2019. Tex. Gov't Code § 2254.102 (West 2019).

In 2017, when the Taxing Units entered into their engagement letter with Mr. Lemon, state laws authorized counties to engage attorneys on a contingent fee, subject to "review and approval by the comptroller." Tex. Gov't Code § 403.0305. However, Mr. Lemon has provided no evidence that the required review and approval by the comptroller were obtained or sought. Having failed to follow the proper procedure for approval, the engagement letter that purports to grant Mr. Lemon authority to represent the Taxing Units is void.

In Pecos County, Mr. Lemon cited Tax Code § 6.30, which provides that a taxing unit "may contract with any competent attorney to represent the unit to enforce the collection of delinquent taxes." However, even this limited grant of authority to taxing units comes with subsections that "strictly regulate[] the percentage by which a taxing unit may compensate" and provide that any "contract with an attorney that does not conform to" the limitations of § 6.30 is void. Tex. Att'y Gen. Op. JC-0290, 2000 WL 1515207, at *3 (*citing* § 6.30(c) & (e)).

Under the modern Tax Code, authority conveyed under § 6.30 to hire a contingent-fee lawyer "to enforce the collection of delinquent taxes" does not authorize a taxing unit to hire a contingent-fee tax ferret, whose charge is not to collect delinquent taxes, but to establish that property has escaped taxation in the first place.[2] *Id.* Indeed, far from enabling tax-ferret engagements, § 6.30 supports the proposition that any contingent-fee engagement by a taxing unit must be authorized by "express authority" in a statute that imposes restrictions on the terms of such agreements. *See id.* at *4.

[2] Attorney General Cornyn acknowledges a line of 1930s-era cases holding that tax ferret contracts relate to "the collection of delinquent taxes"—the type of contingent fee contracts authorized by § 6.30. But Attorney General Cornyn concludes that those 1930s-era cases do not inform the legality of a tax-ferret engagement under the modern Tax Code because "the law has been substantially amended since the tax ferret cases were decided." Tex. Att'y Gen. Op. JC-0290 , 2000 WL 1515207 (*citing Grand Prairie Hosp. Dist. v. Dallas County App. Dist.*, 730 S.W.2d 849, 851 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (adoption of Tax Code repeals all inconsistent general, local, and special laws)).

3. Public Policy Supports Texas Attorney General Cornyn's Conclusion That a Taxing Unit Has No Implied Authority To Enter Into a Tax-Ferret Agreement.

a. Contingent-Fee Tax-Ferret Agreements Undermine Core Tenets of Property Taxation.

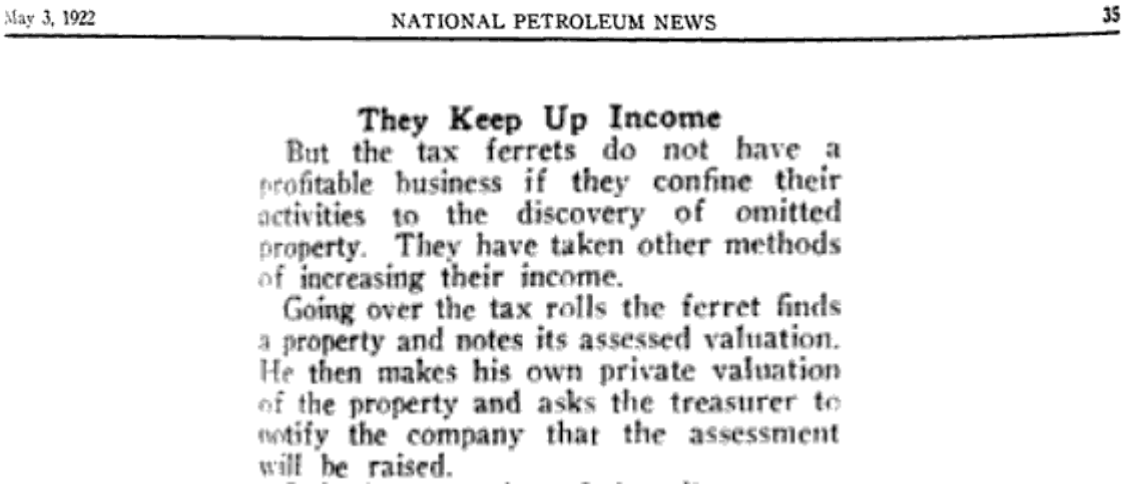
In Texas, taxpayers pay tax based on an appraisal conducted by a neutral, licensed, authorized appraiser. Tex. Tax Code § 6.05(c). Tax appraisers are statutorily required to appraise all taxable property at its "market value." Tex. Tax Code § 23.01; *see also id*. § 1.04(7) (defining market value). In determining market value, appraisers are also required to follow ethical standards. Tit. 16 Tex. Admin. Code § 94.100. Thus, the appraiser's role is to seek the accurate, fair market value of property. The Texas Constitution also promises that all taxation "shall be equal and uniform." Tex. Const. art. VIII § 1(a). The Constitution envisions a system in which all taxpayers are treated equally.

The engagement letters at issue in this case guarantee that Kinder Morgan will not be treated like other taxpayers and will not receive the benefit of an "equal and uniform" system. Mr. Lemon can *only* be compensated if he is successful in raising Kinder Morgan's tax bill. No other taxpayer in Scurry County—or possibly the state—is facing an attempt to have its taxes determined not by a Chief Appraiser searching for "market value" but by a private individual pursuing the highest return on years of litigation. As outlined below, Mr. Lemon has responded to the pressures

and incentives of this structure in a manner that vindicates the public policy concerns surrounding tax ferrets.

b. Tax-Ferret Agreements Are Against Public Policy.

Tax ferrets historically have sought to increase property valuations and appraisals for taxpayers who, like Kinder Morgan, own oil and gas interests. In 1922, the *National Petroleum News* explained that tax ferrets in Oklahoma were increasing their income by (1) "[g]oing over the tax rolls," (2) "find[ing] a property and not[ing] its assessed valuation," (3) "mak[ing] his own private valuation of the property," and finally (4) "ask[ing] the treasurer" to raise the assessment:



May 3, 1922 NATIONAL PETROLEUM NEWS 35

They Keep Up Income

But the tax ferrets do not have a profitable business if they confine their activities to the discovery of omitted property. They have taken other methods of increasing their income.

Going over the tax rolls the ferret finds a property and notes its assessed valuation. He then makes his own private valuation of the property and asks the treasurer to notify the company that the assessment will be raised.

App-(D), Ex. 6, National Petroleum News, *Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies* (1922).

The practice of tying contingent-fee compensation to tax revenue makes tax-ferret contracts problematic. Tax revenues are redirected from public purposes and paid to the private tax ferret. And taxpayers are subjected to the profit motives of

private entities cloaked with the power of government—motives that incentivize the tax ferret to engage in abuse, coercion, and harassment to maximize the targeted taxpayer's tax liability.

The problematic incentives created by a tax-ferret arrangement have historically been a cause of concern for courts and commentators:

- In 1908, the Supreme Court of Kansas wrote that it was "impossible to contemplate any civilized community, with a knowledge of its history, again reviving the odious practice" of authorizing private tax ferrets. *State ex. rel Coleman v. Fry*, 95 P. 392, 394 (Kan. 1908).
- In Oklahoma, tax ferrets of the 1920s were accused of sending out burdensome discovery subpoenas to taxpayers to troll for escaped property and submitting appraisals to the tax authorities based on "mere guesses." App-(D), Ex. 6, National Petroleum News, *Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies* (1922).
- In 2000, then-Texas Attorney General John Cornyn issued an Attorney General Opinion concluding that Texas law and public policy prohibit contingent-fee, tax-ferret agreements—where a taxing unit deputizes a private person to search for additional tax revenue on a contingent-fee basis. Tex. Att'y Gen. Op. JC-0290, 2000 WL 1515207, at *2.

- In 2011, the National Conference of State Legislatures' Task Force on State and Location Taxation, of which Texas is a member, issued a unanimous resolution opposing the use of "contingency fee arrangements for the conduct of taxpayer audits." App-(D), Ex. 7, NAT'L CONF. OF STATE LEGISLATURES, *Resolution Concerning the Use of Contingent Fee Arrangements in Tax Audits and Appeals* (Sept. 30, 2011).

c. Mr. Lemon's Coercive and Harassing Conduct Is Typical of Tax Ferrets and Underscores the Public Policy Problems With Tax-Ferret Engagements.

Mr. Lemon's conduct exemplifies the profit-driven, abusive, and harassing practices typical of a tax ferret. As a starting point, Mr. Lemon's exact strategy for signing up the Taxing Units and pursuing Kinder Morgan has been an identified tax ferret strategy since at least 1922. In the *Petroleum News* article discussed above, an oil and gas industry publication identifies how tax ferrets seek to supplement their income from identifying omitted property by conducting private appraisals at a higher figure and convincing taxing authorities to apply them. *Supra*, p. 20.

Once he was engaged, Mr. Lemon undertook the abusive and threatening tactics identified by courts and commentators as standard features of tax-ferret engagements. Much like the "blackmail" or "threats of public exposure" condemned by the Kansas Supreme Court (*supra*, p. 21), Mr. Lemon has repeatedly asserted that

Kinder Morgan should have disclosed these lawsuits in its SEC filings and to its creditors. In one set of discovery requests, Mr. Lemon asked Kinder Morgan to explain why it had not disclosed these taxing unit cases to the SEC and how Kinder Morgan had not violated certain covenants in debt instruments with a list of over twenty banks. App-(D), Ex. 8, Taxing Unit Discovery Requests. These requests have nothing to do with the facts at issue in the case and were plainly only included as a "threat of public exposure" that Mr. Lemon would notify the SEC and list of banks of alleged wrongdoing.

Indeed, Mr. Lemon followed through on his threats. In late December, Kinder Morgan started receiving copies of a series of letters sent by Mr. Lemon to certain banks. One copy of the letter was sent to six different recipients at Barclays Bank and to the Bank's Texas agent for the service of process. App-(D), Ex. 9, Letter Re: Taxing Unit Information Request - Kinder Morgan, Inc. Subsidiaries (Dec. 6, 2019). In the letter, which was styled as a "Taxing Unit Information Request," Mr. Lemon notes that the Texas Tax Code provides taxing units with a "first priority lien" for any "unpaid ad valorem taxes" and then notes that he represents a group of taxing units in cases against Kinder Morgan. *Id.* at 2. He then asserts that "an independent and qualified appraiser" has determined that Kinder Morgan's Scurry County assets are undervalued by nearly $2 billion. *Id.* He does not explain why this "independent" appraiser has bothered to issue such an opinion.

The letter then adds a list of document requests, including a request that purports to notify the bank that "many financial institutions . . . were required to make significant payments in settlement and/or fines relative to Enron Corporation, while others suffered huge financial losses." *Id.* at 3. This notification is followed by a request for information regarding "the investigation performed and consideration given to the fact that Kinder Morgan evolved from Enron." *Id.* The request then provides a purported list of Kinder Morgan employees who were employed by Enron. The letter concludes with other requests about communications between Kinder Morgan and its banks, and Mr. Lemon's second request for a written response within "thirty (30) days." *Id.* at 4.

Even leaving aside that Texas statutes govern the circumstances and manner in which bank records are released, Mr. Lemon cannot possibly have hoped that financial institutions would voluntarily submit confidential records about their customers and their business to a private individual. The letter, and the accompanying requests, can only be characterized as an attempt to embarrass Kinder Morgan and to provide a preview of the scorched-Earth litigation tactics that would result from Kinder Morgan's continued attempts to have the claims dismissed. The letters likely went to more than a dozen institutions, and Kinder Morgan was required to expend time and resources over the holidays to explain and address the request with banks that were unsure of whether the request had any force of law.

Indeed, Enron is Mr. Lemon's common refrain, both in attempting to substantiate this speculative claim and in regular dealings with opposing counsel. Hardly a discovery dispute or scheduling conflict arises that does not result in a citation to an Enron case and an allegation that Kinder Morgan or its counsel is engaging in "bad faith" or "Enronesque" conduct. App-(D), Ex. 10, Correspondence Re: "Enronesque" Position. Indeed, even in response to Kinder Morgan's request that he demonstrate his authority to represent his clients on a contingent fee, instead of providing any legal support for his authority, Mr. Lemon accused counsel of bad faith, alleged "nefarious intent," and again cited irrelevant Enron securities litigation from 18 years ago. App-(D), Ex. 3, Letter from Mr. Lemon to Kinder Morgan Counsel, dated January 9, 2020. Again, the only purpose of these repeated allegations and attempted insults is to harass and embarrass Kinder Morgan into compliance, and they are tax-ferret practices that date back over 100 years.

The Taxing Units' appeal to the district court is void, and thus untimely and jurisdictionally barred, because it was prosecuted by Mr. Lemon under an unauthorized tax-ferret engagement. The Court should render judgment dismissing this case for lack of subject-matter jurisdiction.

II. The TCPA Applies to the Taxing Units' Legal Action.

Although Kinder Morgan believes this case is without jurisdiction, Kinder Morgan maintains its appeal of the denial of its TCPA Motion to Dismiss. The

Taxing Units' allegation that Kinder Morgan knowingly and purposefully made misrepresentations to SCAD falls squarely within the TCPA because that allegation attacks Kinder Morgan's rights to free speech and petition. The purpose of the TCPA is to protect the "constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law" by providing for the dismissal of legal actions "based on or [in] response to a party's exercise of the right of free speech, right to petition, or right of association" unless the claimant can establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code §§ 27.002, 27.003(a), 27.005(c). To carry out this purpose, the TCPA provides for expedited dismissal of meritless claims that seek to intimidate or silence citizens on matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 584, 586 (Tex. 2015).

The TCPA establishes a two-step process for determining whether the statute applies to a legal action. Once a TCPA Motion to Dismiss has been filed, the movant has the burden of demonstrating that the legal action is "based on or is in response to the movant's exercise of the right of free speech, the right to petition, or the right of association." Tex. Civ. Prac. & Rem. Code §§ 27.003(a), 27.005(b). The TCPA "shall be construed liberally to effectuate its purpose and intent fully." Tex. Civ. Prac. & Rem. Code § 27.011(b). Indeed, the Texas Supreme Court has warned against "improperly narrow[ing] the scope of the TCPA by ignoring the Act's plain

language and inserting … requirement[s]." *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017). All doubts as to whether the TCPA applies must be resolved in favor of applying the TCPA. Tex. Civ. Prac. & Rem. Code § 27.011(b). The TCPA's purpose is to safeguard constitutional rights, in particular, the rights of speech and petition. *Id.* § 27.001.

If the movant satisfies this initial burden, the nonmovant can demonstrate that the TCPA still does not apply by carrying its burden of demonstrating that the legal action falls under one of the TCPA exemptions *See Hieber v. Percheron Holdings, LLC*, -- S.W.3d --, 2019 WL 6001153, at *2 (Tex. App.—Houston [14th Dist.] Nov. 14, 2019, no pet. h.); *TransDesign Int'l, LLC v. SAE Towers, Ltd.*, No. 09-18-00080-CV, 2019 WL 2647659, at *7 (Tex. App.—Beaumont June 27, 2019, pet. denied). If the TCPA applies and is not exempted, the non-movant bears the burden of establishing a prima facie case for each essential element of the claim in question. *Id.*

Because Kinder Morgan's communications fall within these statutory definitions, the TCPA applies and the Taxing Units' claim should be dismissed.

A. The Taxing Units' Claim Discourages Kinder Morgan From Exercising Its Right to Free Speech.

There can be no real dispute that the Taxing Units' claim allows Kinder Morgan to invoke the protections of the TCPA. The TCPA defines the exercise of the right of free speech as "a communication made in connection with a matter of

public concern." Tex. Civ. Prac. & Rem. Code § 27.001(3). "Communication" is defined broadly under the statute and "includes the making or submitting of a statement or document in any form or medium," *id*. § 27.001(1), both public and private. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015). Indeed, "[t]he TCPA casts a wide net" and "[a]lmost every imaginable form of communication, in any medium, is covered." *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018). Likewise, "public concern" is defined broadly, and includes "a statement or activity regarding . . . a matter of political, social, or other interest in the community; or a subject of concern to the public." Tex. Civ. Prac. & Rem. Code § 27.001(7)(B)–(C). The communication need only have a "tangential relationship" to or be "in connection with" any "identified matter[] of public concern chosen by the Legislature." *Coleman*, 512 S.W.3d at 900.

The Taxing Units' fraud allegations implicate Kinder Morgan's right to speak freely. Kinder Morgan voluntarily submitted information to SCAD in connection with Kinder Morgan's protest of its appraised values. CR51. These communications relate to a matter of public concern as they were aimed at reaching an accurate tax valuation, an integral function of any government and of paramount concern to the public.

B. The Taxing Units' Claim Threatens Kinder Morgan's Right to Petition.

By alleging omission due to taxpayer fraud, the Taxing Units have brought a claim directed at Kinder Morgan's right to petition. Under the TCPA, the right to petition includes any "communication in connection with an issue under consideration or review by a . . . governmental body in another governmental or official proceeding." Tex. Civ. Prac. & Rem. Code § 27.001(4)(B). As explained above, communication is defined broadly, and an "official proceeding" "means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant." *Id*. § 27.001(8). A "public servant" is a "person elected, selected, appointed, employed, or otherwise designated as . . . an officer, employee, or agent of the government." *Id*. § 27.001(9)(A). The Texas Supreme Court recently held that filings in an administrative proceeding are "an exercise of the right to petition as defined by the TCPA." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 18-0656, 2019 WL 6971659, at *7 (Tex. Dec. 20, 2019).

The Taxing Units' unfounded allegations rest on Kinder Morgan's communications with a governmental body and a public servant. In response to a request for information, Kinder Morgan voluntarily submitted information to SCAD, a governmental body, for ad valorem tax purposes. CR50-51. Kinder Morgan also exercised its right under the Tax Code as a property owner to protest the appraisal value of its mineral interests in an official proceeding conducted before the Scurry

County Chief Appraiser, a public servant. CR55. Not only are these communications filings in an administrative proceeding, they also represent clear examples of petitioning the government. As such, the Taxing Units' omission-by-taxpayer-fraud claim implicates Kinder Morgan's exercise of its right to petition and should be dismissed under the TCPA.

C. The Taxing Units' Legal Action Is Based on a Statutory Claim, Not a Common Law Fraud Claim.

The Taxing Units contend their claim is exempt from TCPA dismissal because it is protected by the newly added TCPA Exemption 12. Pursuant to an amendment effective September 1, 2019, Exemption 12 of the TCPA renders the TCPA inapplicable to "a legal action based on a common law fraud claim." Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1–9, 12 (H.B. 2730) (emphasis added). However, this recent amendment does not impact the Taxing Units' claim because their claim is based in statute, not the common law. According to well-established principles of statutory interpretation, the exemption does not apply and their claim should be dismissed.

1. The Taxing Units' Interpretation of Exemption 12 Contradicts the Plain Meaning of Exemption 12.

"Legislative intent is best revealed in legislative language: 'Where text is clear, text is determinative.'" *In re Office of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013). Courts "endeavor to read the statute contextually, giving effect to every

word, clause, and sentence." *Id.* It is presumed that every word of a statute must have been used for a purpose. *Eddins-Walcher Butane Co. v. Calvert*, 298 S.W.2d 93, 96 (Tex. 1957).

Exemption 12 of the TCPA renders the TCPA inapplicable to "a legal action based on a common law fraud *claim*." Tex. Civ. Prac. & Rem. Code § 27.010(a) (emphasis added). The plain meaning of Exemption 12 is that it exempts only common law fraud claims—not statutory claims.

The Taxing Units attempt to shoehorn their allegations into Exemption 12 by arguing that their statutory claims under the Tax Code require proof of the elements of common law fraud. CR79. In doing so, the Taxing Units must erroneously rewrite the statute to create an exemption for statutory claims where the statute requires a claimant to prove the elements for common-law fraud. But Exemption 12 applies only to a "legal action based on a common law fraud claim," not a statutory claim.

2. The Taxing Units' Interpretation of Exemption 12 Ignores the Legal Meaning of the Phrase "Common Law Fraud Claim."

Statutes are presumed to be enacted by the Legislature with full knowledge of existing law. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 677 (Tex. 2007). The use of a term with an accepted legal meaning, without the inclusion of a definition,

shows the Legislature's intent that the term be given its accepted legal meaning. *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942).

Exemption 12 uses the phrase "common law fraud claim," which has a distinct and separate meaning from a statutory fraud claim. Tex. Civ. Prac. & Rem. Code § 27.010(a)(12). Common law fraud is a claim that has developed over time through case law, whereas statutory fraud is defined by, and limited to, specific statutes.

Examples of statutory fraud include fraudulent and deceptive trade practices, fraudulent real estate sales, securities fraud, internet fraud, fraudulent transfers, and the statutory taxpayer fraud claims at issue in this appeal. In fact, the DTPA was amended at the same time as the TCPA. Act of May 15, 2019, 86th Leg. (S.B. 2140). These claims and their recent amendments illustrate the Legislature's awareness of statutory fraud claims and implicit rejection of such claims for Exemption 12. The modifier "common law" and the noun "claim" show the Legislature intended to exempt the specific "claim" of "common law" fraud. For "common law" to have any meaning, Exemption 12 must be read as excluding other types of fraud.

This rationale is even more significant because the statute in question was amended less than six months ago. This TCPA amendment is a thoroughly modern statute enacted with a full view of existing law, including the difference between statutory fraud claims and common law fraud claims.

3. The Taxing Units' Interpretation of Exemption 12 Fails To Read the TCPA as a Whole.

Courts "consider statutes as a whole rather than their isolated provisions." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). Here, the Taxing Units are governmental entities purporting to bring a legal action to enforce the Tax Code against Kinder Morgan, but a different TCPA exemption already exists for legal actions brought by government entities for the purpose of enforcing statutes. Exemption 1 to the TCPA provides that the TCPA does not apply to "an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney." Tex. Civ. Prac. & Rem. Code § 27.010(a)(1).

Even if the Taxing Units' claims would qualify as an "enforcement action" under the statute, their claims still do not qualify for Exemption 1 because the suit has not been brought by "the attorney general, a district attorney, a criminal district attorney, or a county attorney." This relatively short list of elected, government-employed attorneys shows that the Legislature already considered what governmental entities can invoke a TCPA exemption when bringing an action based on statutory powers. The Taxing Units and their private attorney do not qualify.

4. The Taxing Units' Interpretation of Exemption 12 Ignores the Principle That the Legislature's Inclusion of a Specific Limitation Generally Excludes All Others.

The inclusion of a specific limitation generally excludes all others, *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002), and if specific exclusions or exceptions are set forth, it is clear the Legislature intended that no others apply. *Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303, 307 (Tex. 1978).

If accepted, the Taxing Units' interpretation of Exemption 12 would impermissibly expand upon the specific exemptions crafted by the Legislature in this recent amendment. By contrast, limiting Exemption 12 to only common law fraud claims gives meaning to every word of the statute without adding to or expanding the Legislature's specific exemptions.

5. The Taxing Units' Interpretation of Exemption 12 Ignores Judicial Precedent That These Statutory Tax Code Claims Are Not Common Law Fraud Claims.

This Court recently held that these same statutory Tax Code claims, brought by these same Taxing Units, do not constitute "an independent common law fraud claim." *Kinder Morgan SACROC, LP v. Scurry County*, 589 S.W.3d 889, 900 (Tex. App.—Eastland 2019, pet. filed). In a nearly identical dispute, the very same Taxing Units sued Kinder Morgan seeking to have Kinder Morgan's mineral interests reappraised for previous tax years. *Id.* at 893. One of the Taxing Units' allegations was that mineral interests of Kinder Morgan were omitted from the appraisal roll

due to fraudulent misrepresentations by Kinder Morgan, resulting in an insufficient tax assessment. *Id.* at 894. In evaluating this allegation, this Court held that the Taxing Units did not assert "an independent common law fraud claim" against Kinder Morgan but, instead, alleged fraudulent misrepresentation as a factual basis to support their statutory claim under the Tax Code. *Id.* at 900.

Even the Taxing Units concede they are alleging a statutory claim, not a common law fraud claim, by acknowledging that "*ExxonMobil* is the primary case holding that there is no common law fraud cause of action, and that a taxing unit must pursue its claims under the Texas Tax Code Sections 25.21 and 41.03(a)(2)." CR80. This sentence accurately identifies that the "claim" available to taxing units comes from two statutory provisions in the Tax Code, not common law.

The elements of fraud are relevant to the Taxing Units' legal action only because cases like *ExxonMobil* have interpreted the words "omitted" or "exclusion" in sections 25.21 and 41.03(a)(2) to include situations where the appraisal of an asset was impacted by taxpayer fraud. In *ExxonMobil*, the court rejected the taxing unit's argument that the Tax Code did not include a remedy for taxpayer wrongdoing and that a common law fraud claim was needed. *In re ExxonMobil*, 153 S.W.3d 605, 613 (Tex. App.—Amarillo 2004, orig. proceeding). The court held that taxing units were limited to claims found in the Tax Code and that "[f]or purposes of section

25.21, property 'omitted' from the appraisal roll includes that undervalued by virtue of taxpayer fraud." *Id.*

The *Beck & Masten* case confirms the distinction between (1) taxpayer fraud as a factual theory to support a statutory claim, and (2) taxpayer fraud as an independent common-law fraud claim. In that case, the taxpayer argued that summary judgment had been inappropriately granted because the reliance and causation elements of fraud had not been conclusively established, citing cases listing the elements of common law fraud. The court disagreed, noting:

> [W]hile fraud goes to the issue of whether the assessment was void, appellees' remedy in the instant case is authorized by the Property Tax Code, not by a common law cause of action for fraud. **In other words, proof of fraud was only necessary to bring appellees within the ambit of the Code.**

Beck & Masten Pontiac-GMC, Inc. v. Harris Cty. Appraisal Dist., 830 S.W.2d 291, 295 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

In *Jim Wells County v. El Paso Production*, claims brought against taxpayers by taxing units were dismissed for lack of jurisdiction based on the finding that the taxing units had not exhausted administrative remedies. *Jim Wells Cty. v. El Paso Prod.*, 189 S.W.3d 861 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). On appeal, the taxing units argued, in part, that their claims against the taxpayers were grounded in common law, not statute, and so they had no obligation to exhaust remedies. The appellate court rejected this argument, holding that the taxing units

"cannot avoid the procedures and remedies in the Tax Code by characterizing a statutory tax case as a common law fraud case." *Id.* at 870–71.

These cases do not treat taxpayer fraud as a "claim" but, rather, as a factual theory for proving one element of a separate, statutory claim provided by the Tax Code. The Taxing Units' claim is based on powers granted to taxing units by statute, and they cannot invoke protections afforded to claims based on common law to avoid the TCPA, especially in light of the narrow scope of Exemption 12. As such, Exemption 12 is not implicated by the Taxing Units' allegations.

D. The Taxing Units Erroneously Attempted To Rewrite the TCPA To Insert Additional Requirements for TCPA Applicability.

While the Taxing Units did not directly dispute Kinder Morgan's contention that these claims meet the TCPA's requirements, the Taxing Units did attempt to add additional requirements or exceptions to the statute not found in the statutory text. The trial court, however, denied Kinder Morgan's TCPA Motion based on the trial court's conclusion that the Taxing Units' claims are exempted from the TCPA as a legal action based on a common law fraud claim. 2RR135:7-9. Thus, in denying Kinder Morgan's TCPA Motion, the trial court did not rely on the Taxing Units' erroneous attempts to engraft new requirements onto the TCPA. Indeed, those attempts were meritless.

The Taxing Units contended that Kinder Morgan's speech was not "free" because Kinder Morgan engaged in that speech to avoid a subpoena. CR241. That

argument is not supported by the TCPA's language. Moreover, that argument ignores the fact that Kinder Morgan also engaged in oral communications with the appraisal district and that, since no subpoena was ever issued, Kinder Morgan plainly did engage in voluntary speech. The "free speech" argument is also at odds with the Supreme Court's holding in *Youngkin v. Hines* that where the statutory definitions of the rights protected by the TCPA are met, there are no additional requirements grafted onto the plain text of the statute. 546 S.W.3d 675, 679 (Tex. 2018); *see Universal Plant Services, Inc. v. Dresser-Rand Group*, 571 S.W.3d 346, 357-58 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

The Taxing Units also contended that Kinder Morgan cannot invoke the TCPA in furtherance of tax avoidance, and that Kinder Morgan has somehow waived its right to bring a TCPA claim by filing its own protest of the Kinder Morgan appraisals. CR240, 242. Neither of those arguments is supported by the TCPA's language. Again, "[l]egislative intent is best revealed in legislative language: 'Where text is clear, text is determinative.'" *In re Office of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013). None of these arguments has merit.

CONCLUSION AND PRAYER

Kinder Morgan prays that the Court render judgment dismissing this case for lack of subject-matter jurisdiction. Alternatively, Kinder Morgan prays that the Court (1) hold that the Taxing Units' legal action is a statutory claim that is not

exempt under Exemption 12 of the TCPA and (2) remand[3] for the trial court to consider the merits of Kinder Morgan's TCPA Motion to Dismiss. Kinder Morgan prays for such other and further relief to which it may be justly entitled.

[3] The trial court bifurcated its consideration of Kinder Morgan's TCPA Motion to Dismiss; a first hearing would determine the legal issue whether the TCPA applies at all, and if the court concluded that the TCPA applies, a second, evidentiary hearing would determine the merits of Kinder Morgan's TCPA Motion to Dismiss. CR399-400. Because the trial court concluded that the TCPA does not apply at all, the trial court never held the second hearing on the merits of Kinder Morgan's TCPA Motion and never received the parties' evidence. Kinder Morgan therefore requests remand to the trial court for that court to consider the merits of Kinder Morgan's TCPA Motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 8,915 words, excluding the words not included in the word count pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, including footnotes. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/Leslie Gardner Mason
Leslie Gardner Mason

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically transmitted to the Clerk of the Court for electronic filing on this the 18th day of February, 2020. Based on the records currently on file, electronic notice of filing will be sent to all registered counsel of record:

/s/Leslie Gardner Mason
Leslie Gardner Mason

APPENDIX

App-(A): Order on Plaintiffs' Motion to Strike Kinder Morgan's TCPA Motion to Dismiss

App-(B): Tex. Civ. Prac. & Rem. Code § 27.010(12)

App-(C): Plaintiffs' Petition for Review and Writ of Mandamus (2019)

App-(D): Declaration of Michael A. Heidler

Ex. 1: Letter from Mr. Brent Lemon Dated January 3, 2020, to Kinder Morgan counsel

Ex. 2: Letter from Kinder Morgan Counsel Dated January 7, 2020, to Mr. Brent Lemon

Ex. 3: Letter from Brent Lemon Dated January 9, 2020, to Kinder Morgan counsel

Ex. 4: Kinder Morgan and the Pecos County Appraisal District's Joint Motion to Show Authority and Plea to the Jurisdiction, filed in the 83rd Judicial District of Pecos County on January 24, 2020

Ex. 5: Pecos County trial court's Order Granting Kinder Morgan's and Pecos County Appraisal District's Motion to Show Authority and Plea to the Jurisdiction

Ex. 6: Article titled, *Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies* (1922), from the National Petroleum News, from 1922

Ex. 7: National Conference of State Legislatures' Resolution Concerning the Use of Contingent Fee Arrangements in Tax Audits and Appeals, dated September. 30, 2011

Ex. 8: Excerpts from the Taxing Units' discovery requests to Kinder Morgan in this case

Ex. 9: Mr. Lemon's "Taxing Unit Information Request - Kinder Morgan, Inc. and Subsidiaries" to Barclays, dated December 6, 2019

Ex. 10: Correspondence between Mr. Lemon and Kinder Morgan counsel in this case

App.-(A)

Order on Plaintiffs' Motion to Strike Kinder Morgan's TCPA Motion to Dismiss

LAW OFFICE OF D. BRENT LEMON

Renaissance Tower
1201 Elm Street, Suite 4880
Dallas, Texas 75270
www.dblemon.com

Voice (214) 747-2277
Fax (214) 747-2280

December 11, 2019

Honorable Judge Ernie B. Armstrong
132 District Court
1806 25th Street, Suite 402
Snyder, Texas 79549

VIA E-FILING

Re: No. 26719; *Scurry County et al. v. Scurry County Appraisal District et al.*

Dear Judge Armstrong:

Enclosed please find a proposed Order on Plaintiffs' Motion to Strike Kinder Morgan's TCPA Motion to Dismiss in the above referenced matter.

Very truly yours,

D. Brent Lemon

DBL/kh
Encl.
cc: Harper Estes, Via E-service
Jack Shepherd, Via E-service
James Leader, Via E-service
Leslie Mason, Via E-Service
Kirk Swinney, Via E-service

NO. 26719

SCURRY COUNTY;	§	IN THE DISTRICT COURT
	§	
SNYDER INDEPENDENT SCHOOL DISTRICT;	§	
	§	
SCURRY COUNTY JUNIOR COLLEGE DISTRICT d/b/a WESTERN TEXAS COLLEGE;	§	
	§	
SCURRY COUNTY HOSPITAL DISTRICT d/b/a COGDELL MEMORIAL HOSPITAL	§	132nd JUDICIAL DISTRICT
	§	
v.	§	
	§	
SCURRY CO. APPRAISAL DISTRICT	§	
	§	
and	§	
	§	
KINDER MORGAN CO2 CO., LP Individually and as Successor in Interest to KINDER MORGAN SACROC, LP; and KINDER MORGAN PRODUCTION CO., LLC, Individually and as Successor in Interest to KINDER MORGAN PRODUCTION CO., LP	§	SCURRY COUNTY, TEXAS

ORDER ON PLAINTIFFS' MOTION TO STRIKE KINDER MORGAN'S TCPA MOTION TO DISMISS

The Court has considered Plaintiffs' Motion to Strike Kinder Morgan's TCPA Motion to Dismiss and, after review of the pleadings on file and hearing argument of counsel, rules as follows:

1. Plaintiffs' Motion to Strike Kinder Morgan's TCPA Motion to Dismiss is GRANTED IN PART, and as a result, Kinder Morgan's TCPA Motion to Dismiss is DENIED;

2. All other relief requested in Plaintiffs' Motion to Strike is DENIED.

IT IS SO ORDERED.

SIGNED ON THIS 11th day of December, 2019.

Filed 12/11/2019 9:44 AM
Candace Jones, District Clerk
Scurry County, Texas
By: Leeann Zuniga,
Deputy Clerk

HONORABLE ERNIE B. ARMSTRONG

Approved as to Form ONLY:

D. Brent Lemon
for Taxing Units

Leslie Mason
for Kinder Morgan Defendants

App.-(B)

Tex. Civ. Prac. & Rem. Code § 27.010(12)

Vernon's Texas Statutes and Codes Annotated
Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle B. Trial Matters
Chapter 27. Actions Involving the Exercise of Certain Constitutional Rights (Refs & Annos)

V.T.C.A., Civil Practice & Remedies Code § 27.010

§ 27.010. Exemptions

Effective: September 1, 2019
Currentness

(a) This chapter does not apply to:

(1) an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney;

(2) a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer;

(3) a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action;

(4) a legal action brought under the Insurance Code or arising out of an insurance contract;

(5) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that:

(A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or

(B) seeks to enforce a non-disparagement agreement or a covenant not to compete;

(6) a legal action filed under Title 1, 2, 4, or 5, Family Code, [1] or an application for a protective order under Chapter 7A, Code of Criminal Procedure; [2]

(7) a legal action brought under Chapter 17, Business & Commerce Code, other than an action governed by Section 17.49(a) of that chapter;

(8) a legal action in which a moving party raises a defense pursuant to Section 160.010, Occupations Code, Section 161.033, Health and Safety Code, or the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.);

(9) an eviction suit brought under Chapter 24, Property Code;

(10) a disciplinary action or disciplinary proceeding brought under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure;

(11) a legal action brought under Chapter 554, Government Code; or

(12) a legal action based on a common law fraud claim.

(b) Notwithstanding Subsections (a)(2), (7), and (12), this chapter applies to:

(1) a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; and

(2) a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

(c) This chapter applies to a legal action against a victim or alleged victim of family violence or dating violence as defined in Chapter 71, Family Code, or an offense under Chapter 20, 20A, 21, or 22, Penal Code, based on or in response to a public or private communication.

Credits

Added by Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. Amended by Acts 2013, 83rd Leg., ch. 1042 (H.B. 2935), § 3, eff. June 14, 2013; Acts 2019, 86th Leg., ch. 378 (H.B. 2730), § 9, eff. Sept. 1, 2019.

Notes of Decisions (91)

Footnotes

1 V.T.C.A., Family Code § 1.001 et seq.; § 16.001 et seq.; § 71.001 et seq.; § 101.001 et seq.

2 Vernon's Ann. Texas C.C.P art. 7A.01 et seq.

V. T. C. A., Civil Practice & Remedies Code § 27.010, TX CIV PRAC & REM § 27.010

Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

App.-(C)

Plaintiffs' Petition for Review and Writ of Mandamus (2019)

Filed 9/12/2019 2:25 PM
Candace Jones, District Clerk
Scurry County, Texas
By: Leeann Zuniga,
Deputy Clerk

NO. 26719

SCURRY COUNTY;	§	IN THE DISTRICT COURT
	§	
SNYDER INDEPENDENT SCHOOL DISTRICT;	§	
	§	
SCURRY COUNTY JUNIOR COLLEGE DISTRICT d/b/a WESTERN TEXAS COLLEGE;	§	
	§	
SCURRY COUNTY HOSPITAL DISTRICT d/b/a COGDELL MEMORIAL HOSPITAL	§	132nd JUDICIAL DISTRICT
	§	
v.	§	
	§	
SCURRY CO. APPRAISAL DISTRICT	§	
	§	
and	§	
	§	
KINDER MORGAN CO2 CO., LP Individually and as Successor in Interest to KINDER MORGAN SACROC, LP; and KINDER MORGAN PRODUCTION CO., LLC, Individually and as Successor in Interest to KINDER MORGAN PRODUCTION CO., LP	§	SCURRY COUNTY, TEXAS

PETITION FOR REVIEW AND WRIT OF MANDAMUS (2019) WITH REQUEST FOR DISCLOSURE AND REQUEST FOR PRODUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Now Come Scurry County, Snyder Independent School District, Scurry County Junior College District d/b/a Western Texas College, and Scurry County Hospital District d/b/a Cogdell Memorial Hospital, (collectively "Plaintiffs" and "Taxing Units") and file this Petition for Review and Writ of Mandamus with

Request for Disclosure and Request for Production and respectfully show the Court as follows:

I. DISCOVERY LEVEL AND PARTIES

1. Discovery in this lawsuit is intended to be conducted under Level 3, in accordance with Rule 190.4 of the Texas Rules of Civil Procedure.

2. Scurry County is a taxing unit as defined by the statutes of the State of Texas, and may be served through its attorney of record, D. Brent Lemon, Law Office of D. Brent Lemon, 1201 Elm Street, Suite 4880, Dallas, Texas 75270.

3. Snyder Independent School District is a taxing unit and independent school district as defined by the statutes of the State of Texas, and may be served through its attorney of record, D. Brent Lemon, Law Office of D. Brent Lemon, 1201 Elm Street, Suite 4880, Dallas, Texas 75270.

4. Scurry County Junior College District d/b/a Western Texas College is a taxing unit and college district as defined by the statutes of the State of Texas, and may be served through its attorney of record, D. Brent Lemon, Law Office of D. Brent Lemon, 1201 Elm Street, Suite 4880, Dallas, Texas 75270.

5. Scurry County Hospital District d/b/a Cogdell Memorial Hospital is a taxing unit and hospital district as defined by the statutes of the State of Texas, and may be served through its attorney of record, D. Brent Lemon, Law Office of D. Brent Lemon, 1201 Elm Street, Suite 4880, Dallas, Texas 75270.

6. Scurry County Appraisal District ("SCAD") may be served by serving Chief Appraiser Jackie Martin or by service on any other officer or employee of the appraisal district present at the appraisal office at a time when the appraisal office is open for business with the public at its place of business, 2612 College Avenue, Snyder, Texas 79549.

7. Kinder Morgan CO2 Company, LP, Individually and as Successor to Kinder Morgan SACROC, LP, is a domestic limited partnership in the State of Texas and may be served with process through its registered agent, Capitol Corporate Services, Inc., 206 E. 9th Street, Suite 1300, Austin, Texas 78701.

8. Kinder Morgan Production Company, LLC, Individually and as Successor in interest to Kinder Morgan Production Company, LP, is a foreign limited liability company doing business in the State of Texas and may be served with process through its registered agent, Capitol Corporate Services, Inc., 206 E. 9th Street, Suite 1300, Austin, Texas 78701.

9. Kinder Morgan CO2 Company, LP and Kinder Morgan Production Company, LLC are jointly referenced herein as the "Kinder Morgan Entities". The Kinder Morgan Entities are believed to be mineral interest real property owners of the properties at issue in Scurry County for the relevant time period.

II. JURISDICTION AND CONDITIONS PRECEDENT

10. The Court has jurisdiction to perform a *de novo* review of the valuation of the mineral interest real property at issue and to fix the correct values or order the re-appraisal or back appraisal of the mineral interest real property for 2019.

11. On May 29, 2019, the Taxing Units timely filed their Challenge Petitions. **(Exh. 1-E)** On July 10, 2019, a hearing was conducted by the Scurry County Appraisal Review Board and orders denying the Challenges were issued on July 22, 2019. **(Exh. 1-A-D)** A Notice of Appeal was timely filed on August 1, 2019. **(Exh. 1)**

12. Exclusions and omissions of Kinder Morgan mineral interest real property for years 2013-2018 are the subject of an earlier suit still pending before this Court.

13. The Court has jurisdiction to issue the mandamus relief requested. *Jim Wells County v. El Paso Prod. Oil & Gas Co*., 189 S.W.3d 861 (Tex. App.–Houston [1st Dist.] 2006, pet. denied).

14. All conditions precedent to the pursuit of this action have occurred or such have been waived by the Defendants. **(Exh. 1)**

III. INTRODUCTION

15. The Taxing Units assert that mineral interest real property of the Kinder Morgan Entities in Scurry County was erroneously and incorrectly excluded and

omitted from appraisal for the year 2019, including due to taxpayer misrepresentation and fraud, and that accurate values should be determined by this Court. *Beck & Masten Pontiac-GMC, Inc. v. Harris Co. Appraisal Dist.*, 830 S.W.2d 291, 294-95 (Tex.App. – Houston [14th Dist.] 1992, writ denied); *Willacy Cty. Appraisal Dist. v. Sebastian Cotton & Grain, Ltd*., 555 S.W.3d 29 (Tex. 2018); Tex. Tax Code § 41.03(a)(2).

16. The Taxing Units also assert that re-appraisal or back-appraisal for year 2019 is required of the Scurry County Appraisal District as to the mineral interest real property of the Kinder Morgan Entities in Scurry County. *In re ExxonMobil Corp.*, 153 S.W.3d 605, 619 (Tex. App. – Amarillo 2004); Tex. Tax Code Ch. 25, 41.

IV. ***DE NOVO* REVIEW**

17. Plaintiffs are statutorily defined taxing units who have exhausted their administrative remedies and now request a *de novo* review as to the values of the mineral interest real property of the Kinder Morgan Entities in Scurry County for the year 2019. Plaintiffs seek the accurate valuation of the mineral interest real property of the Kinder Morgan Entities. Alternatively, Plaintiffs seek judgment that the real property mineral interests at issue must be re-appraised and back-appraised for the year 2019.

V. MANDAMUS RELIEF SOUGHT

18. The omission of properties, *in toto* and/or *ab initio*, was brought to the attention and knowledge of the Chief Appraiser of the Scurry County Appraisal District as to the mineral interest real property of the Kinder Morgan Entities in Scurry County for the time period 2019. Despite having a mandatory and ministerial duty to re-appraise and back-appraise the mineral interest real property, the Chief Appraiser and the Scurry County Appraisal District have failed to take such action.

VI. REQUEST FOR DISCLOSURE – EACH AND ALL DEFENDANTS

19. Pursuant to the Texas Rules of Civil Procedure, all Defendants are requested to disclose, within fifty (50) days of service of this request, the information or material described in Rule 194.2 of the Texas Rules of Civil Procedure.

VII. REQUEST FOR PRODUCTION - SCAD

20. Attached as **Exh. 2** and served with this Petition, is a Request for Production requiring Defendant Scurry County Appraisal District to produce, within fifty (50) days of service of the request, the documents, information, and data requested.

VIII. REQUEST FOR PRODUCTION – KINDER MORGAN ENTITIES

21. Attached as **Exh. 3** and served with this Petition, is a Request for Production requiring the Kinder Morgan Defendants to produce, within fifty (50) days of service of the request, the documents, information, and data requested.

22. WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear, that they show cause and answer herein, and that the Court award relief in favor of Plaintiffs as follows:

a. fix the accurate and correct appraised values of the mineral interest real property at issue for 2019 in accordance with the requirements of law;

b. issue a writ of mandamus requiring the Scurry County Appraisal District and Chief Appraiser to immediately re-appraise the mineral interest real property at issue for 2019;

c. enter other orders necessary to preserve rights protected by and impose duties required by the law;

d. award costs of court; and

e. and such further and other relief, whether at law or in equity, to which Plaintiffs show themselves justly entitled.

Respectfully Submitted,

LAW OFFICE OF D. BRENT LEMON

By D. Brent Lemon

D. Brent Lemon
State Bar No. 12195900
1201 Elm Street, Suite 4880
Dallas, Texas 75270
Telephone: (214) 727-2277
Facsimile: (214) 747-2280
Email: brent@dblemon.com

ATTORNEY FOR SCURRY COUNTY TAXING UNITS

App.-(D)

Declaration of Michael A. Heidler

No. 11-20-00009-CV

Kinder Morgan Sacroc, LP, Kinder Morgan Co2 Co., LP, Kinder Morgan Production Co., L.P., and Kinder Morgan Production Co., LLC,	§	
	§	In the Court of Appeals
Appellants,	§	
	§	for the Eleventh District
v.	§	
	§	
Scurry County, Snyder Independent School District, Scurry County Junior College District d/b/a Western Texas College; Scurry County Hospital District d/b/a Cogdell Memorial Hospital,	§	of Texas,
	§	at Eastland
Appellees.	§	

DECLARATION OF MICHAEL A. HEIDLER

My name is Michael Heidler, I am an attorney with the law firm Vinson & Elkins, LLP, in Austin, Texas. My date of birth is May 24, 1978 and my address is 2801 Via Fortuna, Suite 100, Austin, Texas 78746. I declare under penalty of perjury that the foregoing is true and correct:

1. I submit this declaration, and the exhibits attached hereto, for the limited purpose of enabling this Court to determine whether Texas courts have subject-matter jurisdiction over this case. *See* Tex. Gov't Code § 22.220(c) ("Each court of appeals may, on affidavit or otherwise, as the court may determine, ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction."); *Greeheyco, Inc. v. Brown*, 565 S.W.3d 309, 325 (Tex. App.—Eastland 2018, no pet.) (op. on mtn. for rehearing) ("[W]e may consider submitted documents that are outside the record for the limited purpose of determining our own jurisdiction.").

2. The Exhibit attached hereto as Exhibit 1 is a true and correct copy of a letter from Mr. Brent Lemon dated January 3, 2020, to Kinder Morgan counsel.

3. The Exhibit attached hereto as Exhibit 2 is a true and correct copy of a letter from Kinder Morgan counsel dated January 7, 2020, to Mr. Brent Lemon.

4. The Exhibit attached hereto as Exhibit 3 is a true and correct copy of a letter from Mr. Brent Lemon dated January 9, 2020, to Kinder Morgan counsel.

5. The Exhibit attached hereto as Exhibit 4 is a true and correct copy of Kinder Morgan's and the Pecos County Appraisal District's Joint Motion to Show Authority and Plea to the Jurisdiction, filed in the 83rd Judicial District Court for Pecos County in Cause No. P-8133-83-CV on January 24, 2020.

6. The Exhibit attached hereto as Exhibit 5 is a true and correct copy of the Pecos County trial court's Order Granting Kinder Morgan's and Pecos County Appraisal District's Motion to Show Authority and Plea to the Jurisdiction, signed February 6, 2020.

7. The Exhibit attached hereto as Exhibit 6 is a true and correct copy of Exhibit C to Kinder Morgan's Motion to Show Authority and Plea to the Jurisdiction filed in the 83rd District Court for Pecos County in Cause No. P-8133-83-CV. That Exhibit C is an article from the publication *National Petroleum News* dated 1922 and entitled *Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies*.

8. The Exhibit attached hereto as Exhibit 7 is a true and correct copy of Exhibit D to Kinder Morgan's Motion to Show Authority and Plea to the Jurisdiction filed in the 83rd District Court for Pecos County in Cause No. P-8133-83-CV. That Exhibit D is a National Conference of State Legislatures' Resolution Concerning the Use of Contingent Fee Arrangements in Tax Audits and Appeals, dated September 30, 2011.

9. The Exhibit attached hereto as Exhibit 8 is a true and correct copy of excerpts from the Taxing Units' discovery requests to Kinder Morgan in this case.

10. The Exhibit attached hereto as Exhibit 9 is a true and correct copy of Mr. Lemon's "Taxing Unit Information Request - Kinder Morgan, Inc. and Subsidiaries" to Barclays, dated December 6, 2019.

11. The Exhibit attached hereto as Exhibit 10 are true and correct copies of correspondences between Mr. Lemon and Kinder Morgan counsel and an excerpt of a filing by Mr. Lemon in the 83rd District Court for Pecos County in Cause No. P-8133-83-CV.

12. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Travis County, Texas on the 18th day of February, 2020.

Michael Heidler

Michael A. Heidler

Exhibit 1

Letter from Mr. Brent Lemon Dated
January 3, 2020, to Kinder Morgan counsel

LAW OFFICE OF D. BRENT LEMON

Renaissance Tower
1201 Elm Street, Suite 4880
Dallas, Texas 75270

Voice (214) 747-2277 brent@dblemon.com Fax (214) 747-2280

January 3, 2020

VIA E-MAIL

James Leader, Jr.
Vinson & Elkins
1001 Fannin Street, Suite 2500
Houston, Texas 77002

Re: Authority for Representation

Dear Mr. Leader:

My client engagement agreements have been publicly available since their execution. I have been corresponding with your firm since at least December 2017. Indeed, the Scurry County and Iraan-Sheffield ISD agreements were provided to you in November 2018. I am not aware of any recent events or any newspaper articles that would have spurred your concerns about my authority to represent my clients.

Your correspondence fails to identify any factual or legal basis to support your purported concerns that I am without authority to represent my clients. If you have any factual or legal basis for your beliefs or concerns, then please identify and provide them. Also, please identify and provide the newspapers and dates of the most recent articles which caused you to become concerned about my clients' representation at this late date.

If you fail to identify and provide such purported legal and factual basis and support but instead move forward with a Rule 12 motion, then I will assume any such motion was filed in complete bad faith and for the purposes of delay and harassment.

Copies of my client engagement agreements are attached.

Very truly yours,

D. Brent Lemon

DBL/kh
Encl.

CONTRACT OF ATTORNEY EMPLOYMENT

This contract is between the **Iraan-Sheffield Independent School District** and the **Pecos River Valley Educational Foundation** (hereinafter "Clients") and **D. Brent Lemon** (hereinafter "Attorney");

1. Clients employ Attorney to represent Clients' interests in pursuing claims against Kinder Morgan, Inc. and all of its predecessors, affiliates, and subsidiaries (hereinafter "Kinder Morgan"), and others who may be responsible in whole or part, for the inaccurate valuation of property of Kinder-Morgan resulting in inadequate and insufficient ad valorem tax payments to the Iraan-Sheffield Independent School District ("the Claim").

2. For and in consideration of the legal services to be rendered pursuing the Claim, Clients hereby assign and agree to pay to Attorney an undivided interest in any recovery made with such to be calculated as:

   > Twenty percent (20%) of all total and gross payments, funds, compensation, or value (including agreement for future payments) received by Clients from any source related to or paid on behalf of Kinder Morgan, Inc., its predecessors, affiliates, or subsidiaries related in any way to the Claim.

3. No settlement of any nature shall be made for any claims of Clients without the complete written approval of Clients, nor shall Clients obtain any settlement of any claims without consultation with Attorney. In the event that the Claim is settled by way of structured settlement or future agreed payments, Clients further authorize Attorney to take his contingency fee interest either in cash or in structured or future payments as Attorney deems appropriate.

4. Attorney agrees to provide the payment of all reasonable litigation expenses, including costs for court filings, expert fees, depositions, writs of execution, and all other reasonable expenses necessary for the prosecution of the Claim. Said paid expenses shall be reimbursed to Attorney from any recovery made relative to the Claim. The reimbursement of the expenses by Clients shall be required only upon a recovery on the Claim and such will be in addition to Attorney's percentage fee compensation.

5. Attorney accepts said employment on such terms and agrees to give the Claim, and all matters connected with it, his best care, skill and ability and at all times to protect the interest of said Clients.

6. Clients acknowledge and agree to keep Attorney advised of the location of board members and employees, to cooperate in the preparation and pursuit of the Claim, and to be present on reasonable notice for any necessary appearances. Each Client agrees to designate a contact individual on their behalf with whom Attorney agrees to update regularly concerning the status of the litigation. Clients also agree to initiate contact with Attorney in the event Clients have questions about the Claim. Clients further agree to provide calculations, information, documentation, photographs, etc. in response to requests from

Attorney, or as necessary to respond to discovery requests of an opposing party and comply with any and all reasonable requests in connection with the preparation and pursuit of the Claim and case.

7. The engagement may be terminated by Clients at any time, however, termination of this agreement does not relieve Clients from Clients' obligation to reimburse Attorney for any reasonable litigation expenses incurred. Should the engagement be terminated by Clients, the Attorney's percentage of interest in the recovery of the contingency fee shall be calculated according to whether the engagement was terminated by the Clients without cause or for good cause.

   a. If the termination was for good cause, then Attorney shall be entitled to pursue compensation via the theory of quantum meruit.

   b. If the termination was done without cause, the Attorney retains all rights outlined in Paragraph 2 (supra).

   If necessary, the question of cause, or lack thereof, shall be litigated in a court of competent jurisdiction in Pecos County, Texas. Should Clients recover any funds or consideration on the Claim after termination of the agreement, Clients agree that Attorney's rights, title, and interest, as determined above, shall be paid in full prior to distribution to Clients or any subsequent firm or owner of the Claim.

8. This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, successors, and assigns.

9. It is further understood and stipulated that the laws of the State of Texas govern this contract and its interpretation and that venue and jurisdiction for any dispute arising from or relating to this contract shall be brought in Pecos County, Texas. Clients expressly agree that any dispute over fees or application of the terms in this contract shall be submitted to **INFORMAL NON-BINDING** mediation and that any remaining or other disputes arising from this contract shall be submitted to a non-jury trial before a civil district court in Pecos County, Texas.

WITNESS OUR HANDS on this 27 day of October, 2017.

By: _____
Kevin Allen, for and on behalf of
Iraan-Sheffield Independent School District

By: _____
Kevin Allen, for and on behalf of
Pecos River Valley Educational Foundation

_____
D. Brent Lemon, Attorney

CONTRACT OF ATTORNEY EMPLOYMENT

This contract is between:

Scurry County (hereinafter "Client")

and

D. Brent Lemon (hereinafter "Attorney");

1. Client employs and authorizes Attorney to represent Client's interests to investigate and review potential errors/irregularities and to pursue any Claims identified against Commercial Entities owning mineral interest real property in Scurry County, Texas, and others who may be responsible in whole or part, which resulted in inaccurate valuations of mineral interest real property and erroneous or insufficient ad valorem tax payment amounts to Client ("the Claims").

2. For and in consideration of the legal services to be rendered, including the investigation, review, and pursuit of the Claims, Client hereby assigns and agrees to pay to Attorney an undivided interest in any recovery made against any such Commercial Entities with such compensation to be calculated as:

> Twenty percent (20%) of all total and gross payments, funds, stocks, compensation, or value however delineated or characterized (including agreement for future payments) received by Client (or Client's assigns or designees) from any source related to or paid on behalf of the Commercial Entities, their predecessors, affiliates, or subsidiaries related in any way to the Claims.

3. No settlement of any nature shall be made of any Claims of Client with the Commercial Entities without the complete written approval of Client, nor shall Client enter any settlement of any Claims without consultation with Attorney. In the event that the Claims are settled by way of structured settlement or future agreed payments, Attorney will take his contingency fee interest and compensation in structured or future payments contemporaneous with Client's receipt, unless otherwise agreed in writing.

4. Attorney agrees to provide the payment of all reasonable litigation expenses, including costs for court filings, expert fees, depositions, writs of execution, and all other reasonable expenses necessary for the prosecution of the Claims. Said paid expenses shall be reimbursed to Attorney from any recovery made relative to the Claims. The reimbursement of the expenses by Client shall be required only upon a recovery on the Claims and such will be in addition to Attorney's percentage fee compensation which will be calculated on the gross recovery amount.

5. Attorney accepts said employment on such terms and agrees to give the Claims, and all matters connected with it, his best care, skill and ability and at all times to protect the interests of said Client.

6. Client acknowledges and agrees to keep Attorney advised of the location of board members (as applicable) and employees, to cooperate in the investigation and pursuit of the Claims, and to be present on reasonable notice for any necessary appearances. Client agrees to designate a contact individual on its behalf with whom Attorney agrees to update regularly concerning the status of the litigation. At least forty-eight (48) hours prior to the filing of any suit in Client's name, the designated individual will be provided a draft of any petition, which must be approved by Client prior to filing. Client also agrees to initiate contact with Attorney in the event Client has questions about the Claims. Client further agrees to provide calculations, information, documentation, photographs, etc. in response to requests from Attorney, or as necessary to respond to discovery requests of an opposing party and comply with any and all reasonable requests in connection with the investigation and pursuit of the Claims.

7. The engagement may be terminated by Client at any time. Should the engagement remain in effect or be terminated by Client without good cause and the Client recover any funds or consideration on the Claims, then Client agrees that Attorney's rights, title, and interest, as described above, shall be paid in full and contemporaneous with payment receipt by Client, and prior to any payment to any subsequently engaged law firm. "Good cause" as used herein is defined as a material breach by Attorney of the standard of care applicable to a reasonably prudent attorney in the same or similar circumstances or a material violation of the Rules of the Texas Disciplinary Code.

8. This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, successors, designees, and assigns.

9. By executing this agreement, Attorney verifies that he does not boycott Israel and he will not boycott Israel during the term of this agreement. Attorney also verifies and affirms that he is not a foreign terrorist organization as identified on the list prepared and maintained by the Texas Comptroller of Public Accounts. If Attorney has misrepresented his inclusion on the Comptroller's list, such omission or misrepresentation will void this agreement.

10. It is further understood and stipulated that the laws of the State of Texas govern this contract and its interpretation, and that venue and jurisdiction for any dispute arising from or relating to this contract shall be brought in Scurry County, Texas. Client expressly agrees that any dispute over fees or application of the terms in this contract shall be submitted to **INFORMAL NON-BINDING** mediation and that any remaining or other disputes arising from this contract shall be submitted for a non-jury determination and trial before a civil district court in Scurry County, Texas.

WITNESS OUR HANDS and agreed;

By: _____ Date: 3/27/18

Judge Ricky Fritz, for and on behalf of
Scurry County

_____ Date: 3/27/18

D. Brent Lemon, Attorney

CONTRACT OF ATTORNEY EMPLOYMENT

This contract is between:

Snyder Independent School District (hereinafter "Client")

and

D. Brent Lemon (hereinafter "Attorney");

1. Client employs and authorizes Attorney to represent Client's interests to investigate and review potential errors/irregularities and to pursue any Claims identified against Commercial Entities owning mineral interest real property in Scurry County, Texas, and others who may be responsible in whole or part, which resulted in inaccurate valuations of mineral interest real property and erroneous or insufficient ad valorem tax payment amounts to Client ("the Claims").

2. For and in consideration of the legal services to be rendered, including the investigation, review, and pursuit of the Claims, Client hereby assigns and agrees to pay to Attorney an undivided interest in any recovery made against any such Commercial Entities with such compensation to be calculated as:

> Twenty percent (20%) of all total and gross payments, funds, stocks, compensation, or value however delineated or characterized (including agreement for future payments) received by Client (or Client's assigns or designees) from any source related to or paid on behalf of the Commercial Entities, their predecessors, affiliates, or subsidiaries related in any way to the Claims.

3. No settlement of any nature shall be made of any Claims of Client with the Commercial Entities without the complete written approval of Client, nor shall Client enter any settlement of any Claims without consultation with Attorney. In the event that the Claims are settled by way of structured settlement or future agreed payments, Attorney will take his contingency fee interest and compensation in structured or future payments contemporaneous with Client's receipt, unless otherwise agreed in writing. In the event Client is required or must transfer payment of any portion of a recovery to any third-party or separate governmental entity or agency, then Client will not be responsible to Attorney for compensation on the amount or portion of the recovery transferred or passed through. Client agrees Attorney may seek any payment of compensation as allowed by law from the third-party governmental agency or entity. Including but not limited to Chapter 41 recapture funds. DBL

4. Attorney agrees to provide the payment of all reasonable litigation expenses, including costs for court filings, expert fees, depositions, writs of execution, and all other reasonable expenses necessary for the prosecution of the Claims. Said paid expenses shall be reimbursed to Attorney from any recovery made relative to the Claims. The reimbursement of the expenses by Client shall be required only upon a recovery on the Claims and such

will be in addition to Attorney's percentage fee compensation which will be calculated on the gross recovery amount. Expense reimbursement due from Client will be calculated on a pro rata basis of all recoveries which may be made by entities and other clients of Attorney located in Scurry County, Texas.

5. Attorney accepts said employment on such terms and agrees to give the Claims, and all matters connected with it, his best care, skill and ability and at all times to protect the interests of said Client.

6. Client acknowledges and agrees to keep Attorney advised of the location of board members (as applicable) and employees, to cooperate in the investigation and pursuit of the Claims, and to be present on reasonable notice for any necessary appearances. Client agrees to designate a contact individual on its behalf with whom Attorney agrees to update regularly concerning the status of the litigation. Client also agrees to initiate contact with Attorney in the event Client has questions about the Claims. Client further agrees to provide calculations, information, documentation, photographs, etc. in response to requests from Attorney, or as necessary to respond to discovery requests of an opposing party and comply with any and all reasonable requests in connection with the investigation and pursuit of the Claims.

7. The engagement may be terminated by Client at any time. Should the engagement remain in effect or be terminated by Client without good cause and the Client recover any funds or consideration on the Claims, then Client agrees that Attorney's rights, title, and interest, as described above, shall be paid in full and contemporaneous with payment receipt by Client, and prior to any payment to any subsequently engaged law firm.

8. This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, successors, designees, and assigns.

9. By executing this agreement, Attorney verifies that he does not boycott Israel and he will not boycott Israel during the term of this agreement. Attorney also verifies and affirms that he is not a foreign terrorist organization as identified on the list prepared and maintained by the Texas Comptroller of Public Accounts. If Attorney has misrepresented his inclusion on the Comptroller's list, such omission or misrepresentation will void this agreement.

10. It is further understood and stipulated that the laws of the State of Texas govern this contract and its interpretation, and that venue and jurisdiction for any dispute arising from or relating to this contract shall be brought in Scurry County, Texas. Client expressly agrees that any dispute over fees or application of the terms in this contract shall be submitted to **INFORMAL NON-BINDING** mediation and that any remaining or other disputes arising from this contract shall be submitted for a non-jury determination and trial before a civil district court in Scurry County, Texas.

WITNESS OUR HANDS and agreed;

By: _____ Date: 3/28/18

Eddie Bland, for and on behalf of
Snyder Independent School District

_____ Date: 3/28/18

D. Brent Lemon, Attorney

CONTRACT OF ATTORNEY EMPLOYMENT

This contract is between:

Scurry County Hospital District d/b/a Cogdell Memorial Hospital
(hereinafter "Client")

and

D. Brent Lemon (hereinafter "Attorney");

1. Client employs and authorizes Attorney to represent Client's interests to investigate and review potential errors/irregularities and to pursue any Claims identified against Commercial Entities owning mineral interest real property in Scurry County, Texas, and others who may be responsible in whole or part, which resulted in inaccurate valuations of mineral interest real property and erroneous or insufficient ad valorem tax payment amounts to Client ("the Claims").

2. For and in consideration of the legal services to be rendered, including the investigation, review, and pursuit of the Claims, Client hereby assigns and agrees to pay to Attorney an undivided interest in any recovery made against any such Commercial Entities with such compensation to be calculated as:

> Twenty percent (20%) of all total and gross payments, funds, stocks, compensation, or value however delineated or characterized (including agreement for future payments) received by Client (or Client's assigns or designees) from any source related to or paid on behalf of the Commercial Entities, their predecessors, affiliates, or subsidiaries related in any way to the Claims.

3. No settlement of any nature shall be made of any Claims of Client with the Commercial Entities without the complete written approval of Client, nor shall Client enter any settlement of any Claims without consultation with Attorney. In the event that the Claims are settled by way of structured settlement or future agreed payments, Attorney will take his contingency fee interest and compensation in structured or future payments contemporaneous with Client's receipt, unless otherwise agreed in writing.

4. Attorney agrees to provide the payment of all reasonable litigation expenses, including costs for court filings, expert fees, depositions, writs of execution, and all other reasonable expenses necessary for the prosecution of the Claims. Said paid expenses shall be reimbursed to Attorney from any recovery made relative to the Claims. The reimbursement of the expenses by Client shall be required only upon a recovery on the Claims and such will be in addition to Attorney's percentage fee compensation which will be calculated on the gross recovery amount.

5. Attorney accepts said employment on such terms and agrees to give the Claims, and all matters connected with it, his best care, skill and ability and at all times to protect the interests of said Client.

6. Client acknowledges and agrees to keep Attorney advised of the location of board members (as applicable) and employees, to cooperate in the investigation and pursuit of the Claims, and to be present on reasonable notice for any necessary appearances. Client agrees to designate a contact individual on its behalf with whom Attorney agrees to update regularly concerning the status of the litigation. At least forty-eight (48) hours prior to the filing of any suit in Client's name, the designated individual will be provided a draft of any petition, which must be approved by Client prior to filing. Client also agrees to initiate contact with Attorney in the event Client has questions about the Claims. Client further agrees to provide calculations, information, documentation, photographs, etc. in response to requests from Attorney, or as necessary to respond to discovery requests of an opposing party and comply with any and all reasonable requests in connection with the investigation and pursuit of the Claims.

7. The engagement may be terminated by Client at any time. Should the engagement remain in effect or be terminated by Client without good cause and the Client recover any funds or consideration on the Claims, then Client agrees that Attorney's rights, title, and interest, as described above, shall be paid in full and contemporaneous with payment receipt by Client, and prior to any payment to any subsequently engaged law firm. "Good cause" as used herein is defined as a material breach by Attorney of the standard of care applicable to a reasonably prudent attorney in the same or similar circumstances or a material violation of the Rules of the Texas Disciplinary Code. of Professional Conduct. ERH DRL

8. This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, successors, designees, and assigns.

9. By executing this agreement, Attorney verifies that he does not boycott Israel and he will not boycott Israel during the term of this agreement. Attorney also verifies and affirms that he is not a foreign terrorist organization as identified on the list prepared and maintained by the Texas Comptroller of Public Accounts. If Attorney has misrepresented his inclusion on the Comptroller's list, such omission or misrepresentation will void this agreement.

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WITNESS OUR HANDS and agreed;

By: Ella K Helms Date: 3/28/18

Ella Raye Helms, for and on behalf of
Scurry County Hospital District d/b/a
Cogdell Memorial Hospital

D Brent Lemon Date: 3/28/18

D. Brent Lemon, Attorney

CONTRACT OF ATTORNEY EMPLOYMENT

This contract is between:

Scurry County Junior College District d/b/a Western Texas College
(hereinafter "Client")

and

D. Brent Lemon (hereinafter "Attorney");

1. Client employs and authorizes Attorney to represent Client's interests to investigate and review potential errors/irregularities and to pursue any Claims identified against Commercial Entities owning mineral interest real property in Scurry County, Texas, and others who may be responsible in whole or part, which resulted in inaccurate valuations of mineral interest real property and erroneous or insufficient ad valorem tax payment amounts to Client ("the Claims").

2. For and in consideration of the legal services to be rendered, including the investigation, review, and pursuit of the Claims, Client hereby assigns and agrees to pay to Attorney an undivided interest in any recovery made against any such Commercial Entities with such compensation to be calculated as:

> Twenty percent (20%) of all total and gross payments, funds, stocks, compensation, or value however delineated or characterized (including agreement for future payments) received by Client (or Client's assigns or designees) from any source related to or paid on behalf of the Commercial Entities, their predecessors, affiliates, or subsidiaries related in any way to the Claims.

3. No settlement of any nature shall be made of any Claims of Client with the Commercial Entities without the complete written approval of Client, nor shall Client enter any settlement of any Claims without consultation with Attorney. In the event that the Claims are settled by way of structured settlement or future agreed payments, Attorney will take his contingency fee interest and compensation in structured or future payments contemporaneous with Client's receipt, unless otherwise agreed in writing.

4. Attorney agrees to provide the payment of all reasonable litigation expenses, including costs for court filings, expert fees, depositions, writs of execution, and all other reasonable expenses necessary for the prosecution of the Claims. Said paid expenses shall be reimbursed to Attorney from any recovery made relative to the Claims. The reimbursement of the expenses by Client shall be required only upon a recovery on the Claims and such will be in addition to Attorney's percentage fee compensation which will be calculated on the gross recovery amount.

5. Attorney accepts said employment on such terms and agrees to give the Claims, and all matters connected with it, his best care, skill and ability and at all times to protect the interests of said Client.

6. Client acknowledges and agrees to keep Attorney advised of the location of board members (as applicable) and employees, to cooperate in the investigation and pursuit of the Claims, and to be present on reasonable notice for any necessary appearances. Client agrees to designate a contact individual on its behalf with whom Attorney agrees to update regularly concerning the status of the litigation. At least forty-eight (48) hours prior to the filing of any suit in Client's name, the designated individual will be provided a draft of any petition, which must be approved by Client prior to filing. Client also agrees to initiate contact with Attorney in the event Client has questions about the Claims. Client further agrees to provide calculations, information, documentation, photographs, etc. in response to requests from Attorney, or as necessary to respond to discovery requests of an opposing party and comply with any and all reasonable requests in connection with the investigation and pursuit of the Claims.

7. The engagement may be terminated by Client at any time. Should the engagement remain in effect or be terminated by Client without good cause and the Client recover any funds or consideration on the Claims, then Client agrees that Attorney's rights, title, and interest, as described above, shall be paid in full and contemporaneous with payment receipt by Client, and prior to any payment to any subsequently engaged law firm. "Good cause" as used herein is defined as a material breach by Attorney of the standard of care applicable to a reasonably prudent attorney in the same or similar circumstances or a material violation of the Rules of the Texas Disciplinary Code.

8. This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, legal representatives, successors, designees, and assigns.

9. By executing this agreement, Attorney verifies that he does not boycott Israel and he will not boycott Israel during the term of this agreement. Attorney also verifies and affirms that he is not a foreign terrorist organization as identified on the list prepared and maintained by the Texas Comptroller of Public Accounts. If Attorney has misrepresented his inclusion on the Comptroller's list, such omission or misrepresentation will void this agreement.

10. It is further understood and stipulated that the laws of the State of Texas govern this contract and its interpretation, and that venue and jurisdiction for any dispute arising from or relating to this contract shall be brought in Scurry County, Texas. Client expressly agrees that any dispute over fees or application of the terms in this contract shall be submitted to **INFORMAL NON-BINDING** mediation and that any remaining or other disputes arising from this contract shall be submitted for a non-jury determination and trial before a civil district court in Scurry County, Texas.

WITNESS OUR HANDS and agreed;

By: Barbara R. Beebe Date: 4-9-18

Barbara R. Beebe, for and on behalf of
Scurry County Junior College District d/b/a
Western Texas College

D. Brent Lemon Date: 4/10/18

D. Brent Lemon, Attorney

Exhibit 2

Letter from Kinder Morgan Counsel
Dated January 7, 2020, to Mr. Brent Lemon

Vinson&Elkins

James L. Leader, Jr. jleader@velaw.com
Tel +1.713.758.3242 **Fax** +1.713.615.5047

January 7, 2020

Via email

D. Brent Lemon
Law Office of D. Brent Lemon
Renaissance Tower
1201 Elm Street, Suite 4880
Dallas, Texas 75270

Re: Authority to represent taxing unit clients in Cause No. P-7943-83-CV (Filed 08/28/18); Cause No. 26387 (Filed 08/23/18); Cause No. P-8133-83-CV (Filed 09/12/19); and Cause No. 26719 (Filed 09/12/19)

Dear Brent:

Thank you for your response and for providing your engagement letters. Could you please confirm that you have provided a complete set of your engagement letters and that there are not new engagement letters that were entered into for the 2019 litigation?

While our ultimate position on your authority to proceed in these cases could obviously be impacted by a full response to our letter, our current concern relates to your clients' authority to engage you (or any other private person) on a contingent fee basis to pursue allegedly omitted property. Based on the information we have available to us, we do not believe your taxing unit clients have been granted the authority to enter into contingent fee agreements for this kind of engagement. This is why we are asking you to identify any additional sources of authority, and why we repeat that request with this letter. Since Rule 12 places the burden on the attorney to demonstrate a valid engagement, we are not asking for anything more than is required by that Rule.

The *Snyder Daily News* article I referenced is dated December 26, 2019 and titled "Kinder Morgan appeals to Texas Supreme Court." My prior letter included a request for agreements between you or your clients and the "U.S. Consults" entity referenced in that article, and I am repeating that request again here.

We would appreciate any response to this letter by Thursday at noon.

Sincerely,

James L. Leader, Jr.
Counsel for The Kinder Morgan Defendants

Exhibit 3

Letter from Brent Lemon Dated January 9, 2020,
to Kinder Morgan counsel

LAW OFFICE OF D. BRENT LEMON

Renaissance Tower
1201 Elm Street, Suite 4880
Dallas, Texas 75270

Voice (214) 747-2277 brent@dblemon.com Fax (214) 747-2280

January 9, 2020

VIA E-MAIL

James Leader, Jr.
Vinson & Elkins
1001 Fannin Street, Suite 2500
Houston, Texas 77002

Re: Disclosure of Purported Basis Questioning Authority for Representation

Dear Mr. Leader:

I have authority to represent my clients in the pending litigation and you have long had possession or access to the executed engagement agreements. Indeed, your reference to the Snyder newspaper articles only confirms that my clients are well aware of my authority and my active representation of them. You have also personally seen my clients in attendance at hearings.

Rule 12 requires any motion questioning an attorney's authority to include a sworn verification of the belief that the suit is being prosecuted without authority. Tex. R. Civ. P. 12. Rule 13 requires an attorney's signature certifying the motion has been read and that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Tex. R. Civ. P. 13. Violations of Rule 12 and Rule 13 are subject to a finding of contempt.

As such, the suspiciously timed questioning of my authority to represent my clients appears to be confusion as to the law and facts or simply furtherance of a practice of making meritless filings to harass, delay, and obstruct justice. Your continued refusal to articulate any factual or legal basis or support for your concern certainly suggests the latter motivation.

As you have refused to disclose any basis (substantive, procedural, or technical) for your purported concern, I will assume any Rule 12 filing by your firm and your clients is motivated by a nefarious intent. I will seek to have responsibility assigned for the false sworn oath under Rule 12 and a purposefully inadequate or false investigation and wrongful intent/purpose under Rule 13. Purposefully inadequate or false investigation has been alleged in the past. *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 598-611 (S.D. Tex. 2002).

You are now clearly on notice of the requirements to fully investigate before questioning my authority by sworn motion in court. You are required to disclose to me the purported factual and legal basis of your concern for my specific response in order to meet your investigative obligations prior to filing any Rule 12 motion. Playing hide-and-seek with the factual or legal basis of your purported concern is not complying with your legal obligations.

Very truly yours,

D. Brent Lemon

DBL/kh

Exhibit 4

Kinder Morgan and the Pecos County Appraisal District's Joint Motion to Show Authority and Plea to the Jurisdiction, filed in the 83rd Judicial District of Pecos County on January 24, 2020

Filed: 1/24/2020 5:54 PM
Gayle Henderson,
District Clerk
Pecos County, Texas

Sylvia Guerra

1/27/2020

P-8133-83-CV

IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT	§	IN THE DISTRICT COURT
v.	§	
PECOS CO. APPRAISAL DISTRICT	§	
and	§	83rd JUDICIAL DISTRICT
KINDER MORGAN PRODUCTION CO., LLC, Individually and as Successor in Interest to KINDER MORGAN PRODUCTION CO., LP.	§	PECOS COUNTY, TEXAS

KINDER MORGAN'S AND PECOS COUNTY APPRAISAL DISTRICT'S MOTION TO SHOW AUTHORITY AND PLEA TO THE JURISDICTION

The Kinder Morgan defendants and the Pecos County Appraisal District file this Joint Motion to Show Authority and Plea to the Jurisdiction because counsel for the Plaintiff has been unlawfully engaged to bring this tax ferret lawsuit on a contingent fee basis. Under Texas law, Plaintiff's engagement letter with its counsel of record is void, and this proceeding must be dismissed. In support of this Joint Motion, Movants would respectfully show the Court as follows:

As a governmental entity, the Plaintiff, Iraan-Sheffield Independent School District ("Taxing Unit" or "ISISD"), can exercise only those powers that the Legislature has expressly or impliedly conferred upon it. The powers given to the Taxing Unit by the Legislature do not include the power to enter into a "tax ferret" contract—*i.e.*, to hire a private party to pursue property that has escaped taxation, where that private party is paid a percentage of tax revenues as compensation for its services. Tax ferret contracts have been condemned by courts, commentators, and legislatures, and are carefully regulated not only because they divert public tax revenues to private parties (the tax ferret), but also because they create perverse incentives: the profit motive incentivizes the tax ferret to maximize property taxes by harassment and intimidation directed at

individual taxpayers when the tax system is supposed to ensure fair and equitable treatment of all taxpayers.

There is no legal authority for tax ferret contracts in Texas. The Texas Constitution authorizes the Legislature to establish "the manner in which and the situations under which a [] political subdivision may compensate a public contractor under a contingent fee contract for legal services." Tex. Gov't Code §2254.102. The Texas Attorney General recognizes that the Legislature has not expressly conferred upon governmental entities the authority to enter into tax ferret contracts and that such authority should not be implied. Att'y Gen. Op. JC-0290, 2000 WL 1515207 (2000). When the Legislature provides authority for a governmental entity to enter into a contingent-fee contract, the Legislature makes an express grant of authority accompanied by specific checks on abuses of power. The Legislature has made no such provision for tax ferret contracts, and to imply such a provision would undermine the Legislature's prerogative to establish the "manner in which and situations under which" such contracts may be made. *Id.*

Given this legal backdrop, the Movants are compelled to demand that Mr. Brent Lemon show his authority to represent the Taxing Unit. *See* Tex. R. Civ. P. 12. The Taxing Unit's Petition, signed by Mr. Lemon, asserts a claim that Kinder Morgan's property was omitted from the tax rolls due to taxpayer fraud and that the property has escaped taxation. The contract between the Taxing Unit and Mr. Lemon is clear: for his services, Mr. Lemon receives, as payment, a portion of any tax revenues he generates. Mr. Lemon is acting as a tax ferret because his engagement necessarily includes pursuing allegedly omitted property in exchange for a portion of tax revenues generated by his efforts. Under the laws in existence at the time of Mr. Lemon's engagement, the Taxing Unit had no authority to enter into a contingent-fee tax-ferret contract. The illegal contract is void, and Mr. Lemon is prosecuting this case without authority.

I. BACKGROUND

A. Mr. Lemon Is Engaged by the Taxing Unit on a Contingent Fee Basis.

The Plaintiff Taxing Unit is a public school district and is thus considered a "political subdivision" of the state. *See, e.g.*, Tex. Gov't Code §2251.001(6)(C); *id.* §2254.101(2-a); *id.* §2254.002(1)(B); *id.* §2254.021(4)(D). Although this case was filed in September 2019, it appears that Mr. Brent Lemon is representing the Taxing Unit pursuant to a "Contract of Attorney Employment" dated October 27, 2017 (the "Engagement").[1] In response to two written requests from Kinder Morgan, Mr. Lemon has declined to confirm whether any new engagement letters have been executed with the Taxing Unit.[2]

The material terms of Mr. Lemon's Engagement provide for compensation of a 20 percent contingency fee.[3] Mr. Lemon's 20 percent fee is based on "all total and gross payments, funds, compensation or value (including agreement for future payments) received by [Taxing Unit] from any source related to or paid on behalf of Kinder Morgan, Inc., its predecessors, affiliates, or subsidiaries in any way to the Claim."[4] All expenses covered by Mr. Lemon will be refunded to him out of any judgment in addition to his 20 percent fee.[5] The Engagement's terms are consistent with recent and past press coverage of Mr. Lemon's taxing unit cases against Kinder Morgan in Pecos and Scurry Counties.[6]

The Engagement purports to grant Mr. Lemon the authority to bring a "Claim" against Kinder Morgan and "others who may be responsible in whole or part, for the inaccurate valuation of property of Kinder-Morgan resulting in inadequate and insufficient ad valorem tax payments to

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[1] Ex. A, Letter Correspondence Re: Authority For Representation, Tab A-2, p. 2–3.
[2] *Id.*
[3] *Id.* ¶ 2.
[4] *Id.*
[5] *Id.* ¶ 4.
[6] Ex. B, Snyder Daily News Articles, Tabs B-1–B-3.

the [Taxing Unit]."[7] Apparently acting under the terms of this provision, Mr. Lemon has brought a claim in this suit based on two provisions of the Tax Code dealing with alleged omitted and excluded property. *See* Tex. Tax Code §§ 25.21, 41.01(a)(2). Invoking those statutes, Mr. Lemon alleges that he is entitled to relief based on the allegation that Kinder Morgan property was "erroneously and incorrectly ***excluded and omitted*** from appraisal for years 2019, and 2013-2018, including due to taxpayer misrepresentation and fraud, and that accurate values should be determined by this Court." Pl.'s Original Petition, ¶ 8 (emphasis added). Mr. Lemon is also seeking to take on the role of appraiser at trial and submit a proposed value for Kinder Morgan's property to the jury for final decision. *See id.* ¶ 16(a). Under the terms of the Engagement, Mr. Lemon would be entitled to 20% of any increase in value set by the jury or any other increase in tax revenue that he can tie to his efforts.

B. The Taxing Unit Has Engaged Mr. Lemon as a Tax Ferret.

The Taxing Unit's Engagement with Mr. Lemon employs him and his firm as a tax ferret on behalf of the Taxing Unit—a vocation with a colorful and checkered history in Texas and other states. In short, a tax ferret is a "private entity [who] contracts with a taxing unit to locate property omitted from the tax rolls." Tex. Att'y Gen. Op. JC-0290 (2000) at *2. A contingency tax ferret arrangement is one in which a governmental entity delegates the task of taxation onto a private, profit-motivated entity. The practice of tying contingency fee compensation to tax revenue makes tax ferret contracts problematic: taxpayers are subjected to the profit motives of private entities cloaked with the power of government.

The problematic incentives created by a tax ferret arrangement have historically been a cause of concern for courts and commentators. For example, the Supreme Court of Kansas in 1908

[7] Ex. A, Letter Correspondence Re: Authority For Representation, Tab A-2, p. 2, at ¶ 1.

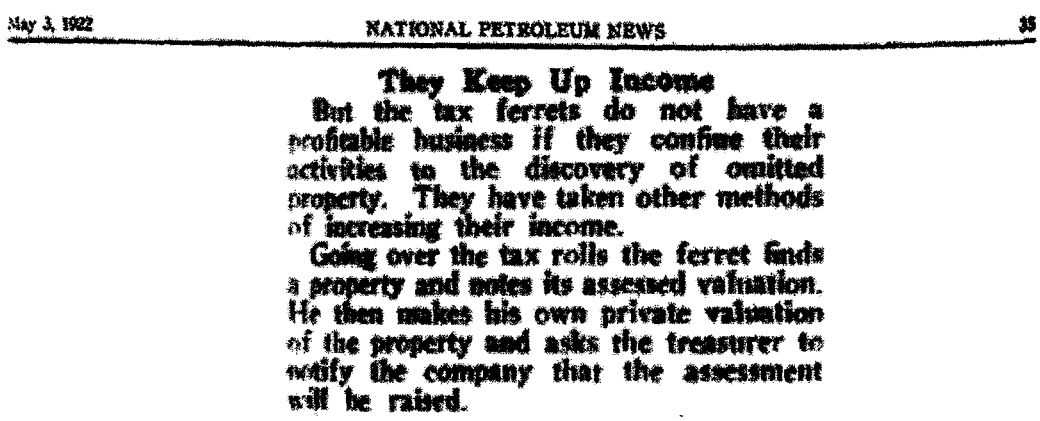
wrote that it was "impossible to contemplate any civilized community, with a knowledge of its history, again reviving the odious practice" of authorizing private tax ferrets. *State ex. rel Coleman v. Fry*, 95 P. 392, 394 (Kan. 1908). In Oklahoma, tax ferrets of the 1920s were accused of sending out burdensome discovery subpoenas to taxpayers to troll for escaped property and submitting appraisals to the tax authorities based on "mere guesses."[8] In 2011, the National Conference of State Legislatures' Task Force on State and Location Taxation, of which Texas is a member, issued a unanimous resolution opposing the use of "contingency fee arrangements for the conduct of taxpayer audits."[9]

In Texas, tax ferret contracts were permitted, subject to strict regulation, until the 1979 overhaul of the property tax system and creation of the Tax Code. As explained by then-Attorney General John Cornyn in a 2000 opinion, from 1930-1931 the Legislature passed legislation that imposed a cap on the allowable contingency fee at 15 percent and required Comptroller and Attorney General approval of any tax ferret contingency fee contracts. *See* Tex. Att'y Gen. Op. JC-0290 (2000) at *3 (citing *White v. McGill*, 114 S.W.2d 860, 862 (Tex. 1938)). The civil articles providing for tax ferret engagements did not survive the Legislature's 1979 overhaul of the property tax system, and in 2000, Attorney General Cornyn concluded in response to a constituent question that there is no express or implied authority that would allow a Taxing Unit to enter into a contingent fee, tax ferret contract. *See id.* at *5.

Here, Mr. Lemon's Engagement with the Taxing Unit lays out a plan of attack against Kinder Morgan that is based on a century-old tax ferret tactic.[10] In 1922, the *National Petroleum*

[8] Ex. C, National Petroleum News, *Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies* (1922).
[9] Ex. D, NAT'L CONF. OF STATE LEGISLATURES, *Resolution Concerning the Use of Contingent Fee Arrangements in Tax Audits and Appeals* (Sept. 30, 2011).
[10] Ex. C, National Petroleum News, *Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies* (1922).

News described a method employed by tax ferrets in Oklahoma to increase their revenue that is remarkably similar to the tactics employed by Mr. Lemon:[11]



May 3, 1922 NATIONAL PETROLEUM NEWS 35

They Keep Up Income

But the tax ferrets do not have a profitable business if they confine their activities to the discovery of omitted property. They have taken other methods of increasing their income.

Going over the tax rolls the ferret finds a property and notes its assessed valuation. He then makes his own private valuation of the property and asks the treasurer to notify the company that the assessment will be raised.

At least in the above scenario, the government official served as a check on the ferret's ambitions by evaluating the evidence presented and either setting a new appraisal or pursuing a claim that property had escaped taxation. Mr. Lemon has taken the Oklahoma tax ferret strategy a step further by invoking the Engagement as the source of his authority to bring a claim alleging that property has escaped taxation *and* in seeking to have the value of that property set at trial. In other words, Mr. Lemon's interpretation of the Engagement grants him even more power and authority than a typical tax ferret because he is acting both as tax ferret (in seeking to establish that property has been omitted) and as appraiser (arguing for his private valuation at trial).

C. Kinder Morgan's Investigation Uncovers That Mr. Lemon's Contingent-Fee, Tax-Ferret Engagement Has Not Been Authorized by the Comptroller or Attorney General.

After conducting a diligent search, Kinder Morgan has not been able to identify any express or implied source of authority that would allow the Taxing Unit to engage Mr. Lemon for this proceeding. At the time the Engagement was executed, a Texas statute granted certain public

[11] *Id.*

agencies the authority to engage a contingent fee attorney subject to approval from the Comptroller's office. Tex. Gov't Code § 403.0305 (Repealed by Acts 2019, 86th Leg., ch. 857 (H.B. 2826), § 9, eff. Sept. 1, 2019). While it seemed unlikely that the ISISD could invoke this statute, Kinder Morgan still made an inquiry with the Comptroller's office and learned that no such agreement had been approved. After September 1, 2019, contingent fee contracts for legal services with any political subdivision must receive attorney general approval. Tex. Gov't Code § 2254.1038 (West 2019). Kinder Morgan also made an inquiry with the Attorney General, and learned that the Attorney General's office had no record of any proposed or approved agreement between the Taxing Unit and any contingent fee attorney.

Next, Kinder Morgan gave Mr. Lemon the opportunity to demonstrate his legal authority to represent the Taxing Unit.[12] While Kinder Morgan sent two letters to Mr. Lemon, including one that specifically raised the concern that the Taxing Unit lacked authority to hire him on a contingent fee basis, neither of Mr. Lemon's responses included a reference to any source of authority beyond the Engagement. Mr. Lemon's refusal to identify any authority necessitated this Motion.

II. ARGUMENT AND AUTHORITIES

A school district, like other government entities, has only those authorities that are granted to it by the Legislature or the Constitution. Despite multiple requests to show his authority to represent the school district, Mr. Lemon has been unable to identify any statute or case granting the school district the authority—whether express or implied—to hire a private lawyer on a contingent fee basis to search for new property to add to the tax rolls. Indeed, Kinder Morgan's investigation into the facts and law surrounding the Engagement confirms that he cannot identify any such authority because there is none under Texas law.

[12] Ex. A, Letter Correspondence Re: Authority For Representation, Tabs A-1 & A-3.

Attorney General John Cornyn made clear in an opinion from 2000 that contingent fee "tax ferret" agreements—wherein a taxing unit deputizes a private person to search for additional tax revenue on a contingent fee basis—violate Texas public policy. As Attorney General Cornyn explained, no statute gives taxing units the express authority to enter into such an agreement. Furthermore, as Attorney General Cornyn also made clear, a taxing unit's authority to enter into contingent-fee tax-ferret agreements cannot be implied from statutes authorizing taxing units to hire contingent fee lawyers to collect delinquent taxes owed on outstanding tax bills.

Courts and commentators from Texas and around the country have long noted the potential for abuse that arises when a private individual, incentivized to maximize his contingent fee (and not to standardize assessments across all tax payers), is deputized with the power to locate, access, and collect taxes on behalf of the state. Those abuses are on a grand display in this case. And they are among the reasons why the Texas Legislature assigned the exclusive authority to appraise property to the county appraisal district, and why the Legislature imposed significant restrictions on taxing units' authority to enter into contingent fee agreements of any kind.

Because Mr. Lemon cannot show authority to represent the school district in this tax ferret case on a contingent fee, he should be disqualified and enjoined from proceeding with this case.

A. No Statute Gives ISISD the Authority to Hire an Attorney to Bring a Tax Ferret Case on a Contingent Fee Basis.

There is no dispute that the Taxing Unit has attempted to hire Mr. Lemon to pursue a claim based on the alleged omission of Kinder Morgan property from the Pecos County tax rolls. And there is no dispute that Mr. Lemon's contract provides that he will be compensated on a contingent fee basis, with 20 percent of any tax revenue generated from his efforts, plus expenses.[13] According to news coverage of similar suits pursued by Mr. Lemon on behalf of taxing units in Scurry County,

[13] *Id.* Tab A-2, p. 2.

an additional percent of any tax revenue generated may be owed to another private entity, a company called US Consults.[14]

There can also be no dispute that taxing units, like ISISD, can only do things that the Legislature or Constitution gives them authority to do. School districts "can act only in accordance with statutory authority." *Harris County Hospital v. Alief Independent School District*, 1992 WL 43927, at *2 (Tex. App.—Houston [14th Dist.] March 5, 1992, writ denied). "Where a school board acts without express or implied statutory authority or in contravention of a statute, then its act is void." *Benavides Independent School District v. Guerra*, 681 S.W.2d 246, 254 (Tex. App.—San Antonio 1984) (writ ref'd r.r.e.). For example, a Harris County district court voided a contingent fee agreement between Harris County and a private firm because the agreement had been executed in contravention of a statute requiring Comptroller approval. *International Paper Co. v. Harris County*, 445 S.W.3d 379, 383-384 (Tex. App.—Houston [1st Dist.] July 25, 2013).

In response to direct requests from Kinder Morgan, Mr. Lemon has declined to offer any source of authority beyond the Engagement. As discussed above, Kinder Morgan sent two letters to Mr. Lemon requesting information on any sources of authority supporting his engagement in his suit. The second letter, sent on January 7, 2020, included a specific request:[15]

> property. Based on the information we have available to us, we do not believe your taxing unit clients have been granted the authority to enter into contingent fee agreements for this kind of engagement. This is why we are asking you to identify any additional sources of authority, and why we repeat that request with this letter. Since Rule 12 places the burden on the attorney to demonstrate a valid engagement, we are not asking for anything more than is required by that Rule.

[14] Ex. B, Snyder Daily News Articles, Tabs B-1, B-3.
[15] Ex. A, Letter Correspondence Re: Authority For Representation, Tab A-3.

Mr. Lemon's response did not identify any additional authority. In fact, the only authorities referenced in the response were offered in support of Mr. Lemon's threat to pursue sanctions and an irrelevant reference to a judicial opinion about Enron:[16]

> **As you have refused to disclose any basis (substantive, procedural, or technical) for your purported concern, I will assume any Rule 12 filing by your firm and your clients is motivated by a nefarious intent. I will seek to have responsibility assigned for the false sworn oath under Rule 12 and a purposefully inadequate or false investigation and wrongful intent/purpose under Rule 13. Purposefully inadequate or false investigation has been alleged in the past. *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 598-611 (S.D. Tex. 2002).**

As demonstrated below, Mr. Lemon answered Kinder Morgan's request for authority with threats because he cannot point to any authority authorizing his client to hire him, on a contingent fee basis, to search for and profit from alleged errors or omissions in a taxpayer's bill.

B. Attorney General Cornyn's 2000 Opinion Instructs that Taxing Units Do Not Have Authority—Express or Implied—to Hire a Contingent Fee Tax Ferret.

In 2000, then-Attorney General John Cornyn issued an opinion on whether a taxing unit could hire a private entity on a contingent fee basis to identify and pursue property that had been omitted from the local tax rolls. Tex. Atty. Gen. Op. JC-0290 (2000). His opinion defined such an engagement as a "tax ferret" contract and concluded that the taxing units could only enter into such an agreement with express or implied statutory authority. *Id.* After analyzing the history of tax ferret contracts in Texas and the intent expressed by the Legislature in passing relevant statutes, Attorney General Cornyn concluded that no statute provides taxing units with the express authority to enter into a tax ferret agreement and that such authority "should not be implied." *Id.*

Attorney General Cornyn explained that such authority cannot be implied because the Legislature "closely regulate[s] contingent fee contracts involving taxing units." *Id.* In support of his conclusion, the Attorney General traced the Legislature's regulation of such contingent fee

[16] *Id.* at Tab A-4.

contracts to the 1920s, when there was significant public outrage against tax ferrets. These engagements "shocked the public conscience as being unfair and exorbitant," and were considered "unfair and unjust to the public" by the legislature. *Id.* (citing *White v. McGill*, 114 S.W.2d 860, 862 (Tex. 1938)). As General Cornyn's opinion explains, the Legislature "desired that such evils should be stopped," *id.* (*citing White*, 114 S.W.2d at 863), and it did so by enacting civil articles that were interpreted by courts as imposing a 15% fee cap on tax ferret engagements and requiring both Attorney General and Comptroller approval for each new agreement.

Attorney General Cornyn then noted that, outside of the tax ferret context, in the "rare circumstances" where a contingent fee agreement with a taxing unit is permitted, it is expressly allowed by a statute that circumscribes the amount of compensation a private entity may receive and the scope of the work she may perform. Tex. Atty. Gen. Op. JC-0290 (2000). He supports this statement by pointing to Tax Code § 6.30, a statute entitled, "Attorneys Representing Taxing Units," which provides that a taxing unit "may contract with any competent attorney to represent the unit to enforce the collection of delinquent taxes." Attorney General Cornyn points out that even this limited grant of authority to the taxing units comes with subsections that "strictly regulate[] the percentage by which a taxing unit may compensate" and provide that any "contract with an attorney that does not conform to" the limitations of § 6.30 is void. *Id.* (*citing* § 6.30(c) & (e)).

Importantly, as the Attorney General's opinion makes clear, under the modern Tax Code, authority conveyed under section 6.30 to hire a contingent fee lawyer "to enforce the collection of delinquent taxes" does not authorize a taxing unit to hire a contingent fee tax ferret, whose charge is not to collect delinquent taxes, but to establish that property has escaped taxation in the first

place.[17] Indeed, far from enabling tax ferret engagements, §6.30 supports Attorney General Cornyn's view: any contingent-fee engagement by a taxing unit must be authorized by "express authority" in a statute that imposes restrictions on the terms of such agreements. *Id.*

Finally, Attorney General Cornyn's opinion points out that the Legislature had spoken "on the issue of contingent fee contracts involving governmental entities as recently as 1999." *Id.* In those amendments, the Legislature allowed certain governmental entities to enter into contingent fee agreements, subject to a long list of procedural steps and safeguards. *Id.* (citing Tex. Gov't Code Ann. §2254.103(a)-(c) (Vernon 2000)). Much like the tax ferret statutes from the 1930s and Tax Code §6.30, the Government Code provisions capped the allowable compensation, and it also imposed detailed requirements on the process for entering into such a contract, including:

- an obligation that the governmental entity prove that there is a substantial need for legal services, that the engagement could not be handled by a government attorney, and that a private attorney cannot be retained on an hourly basis;
- a requirement that contracts involving an expected recovery greater than $100,000 be submitted to the Legislative Budget Board;
- a provision requiring contract language that establishes "a reasonable hourly rate," not to exceed $1,000 and a "base fee" to be calculated by multiplying the hourly rate by the hours worked for each time keeper;
- a requirement that the contract determine a "multiplier" between 0 and 4 that is applied to the "base fee" to set a ceiling for the total recovery allowed without approval from the Legislature;
- a restriction on the size of the "multiplier" and of the maximum percentage of any recovery, absent approval from the Legislature.

[17] Attorney General Cornyn acknowledges a line of 1930s-era cases holding that tax ferret contracts relate to "the collection of delinquent taxes"—the type of contingent fee contracts authorized by § 6.30. But Attorney General Cornyn concludes that those 1930s-era cases do not inform the legality of a tax ferret engagement under the modern Tax Code because "the law has been substantially amended since the tax ferret cases were decided." Tex. Att'y Gen. Op. JC-0290 (2000) (*citing Grand Prairie Hosp. Dist. V. Dallas County App. Dist.*, 730 S.W.2d 849, 851 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (adoption of Tax Code repeals all inconsistent general, local, and special laws)).

Tex. Gov't Code Ann. §§ 2254.103(d)-(e), 106(b)-(c). As of the time Attorney General Cornyn issued his opinion, these sections only authorized contingent fee engagements by certain state-wide entities and did not empower taxing units to enter into agreements covered by the section.

After outlining all the above statutes and the express authority they conferred on certain governmental entities to engage in highly-regulated contingent fee agreements, Attorney General Cornyn concludes that "[n]o similar statute authorizes a taxing unit to enter a contingent fee, tax ferret contract." Tex. Att'y Gen. Op. JC-0290 (2000). Thus, the Attorney General reached his bottom-line conclusion:

> We conclude that, without express authority, no taxing unit . . . may enter a contingent fee, tax ferret contract. . . In light of the legislative policy against a taxing unit entering a contingent fee contract, authority to do so should not be implied. Because there is no such express authority, a taxing unit may not enter a contingent fee, tax ferret contract.

Id.

C. Attorney General Cornyn's Opinion Is Consistent with Current Law.

Attorney General Cornyn's bottom-line conclusion that taxing units do not have the express or implied authority to enter into contingent-fee, tax-ferret agreements has only been further supported in the twenty years since the opinion was issued.

1. The Legislature Continues to Closely Regulate Contingent Fee Agreements, and Has Not Authorized Contingent Fee Tax Ferret Agreements.

In 2007, the Legislature expanded the scope of the Government Code provisions cited by Attorney General Cornyn by expressly authorizing certain, more powerful political subdivisions, including cities and counties, to enter into contingent fee contracts subject to the same restrictions and approvals applicable to the state entities under the 1999 law. Tex. Gov't Code § 403.0305 (West 2007). This change remained in place through September 1, 2019. Tex. Gov't Code § 2254.102 (West 2019). In 2017, when the Taxing Unit entered into its engagement letter with Mr.

Lemon, state laws expressly authorized state entities and certain public agencies, *but not school districts*, to engage attorneys on a contingent fee, subject to certain approvals. *See* Tex. Gov't Code § 403.0305 (West 2007). Attorney General Cornyn's opinion supports the position that the absence of authority expressly granting this power to school districts should not be interpreted as a tacit grant of unregulated power. Indeed, it would be illogical for the Legislature to grant tightly regulated contingent fee authority to larger and more powerful entities, but to reverse nearly a century of legislative practice by granting *unregulated* power to public school boards.

This conclusion is further supported by amendments passed in the 2019 legislative session. As of September 1, 2019, the Legislature expressly authorized any political subdivision (including a school district) to enter into contingent fee arrangements for legal services. Tex. Gov't Code § 2254.1038. But this law maintained the onerous requirements placed on entities discussed above and further required that political subdivisions obtain Attorney General approval of their agreements through a public process. Although these 2019 amendments do not have retroactive effect and do not apply to the engagement letter at issue in this case, they confirm that there is no implied authority for the political subdivision to enter into a contingent fee contract. After all, the 2019 amendments follow the Legislature's longstanding practice: when the Legislature grants a governmental entity the power to engage a contingent fee attorney, it accompanies that grant with extensive regulations and approval requirements; authority is not granted without safeguards.[18]

2. The Texas Constitution Requires Close Regulation and Strict Construction of Contingent Fee Agreements.

[18] Indeed, the reasoning behind including an Attorney General approval requirement in the law was to "give the public the ability to monitor whether particular litigation was worthwhile, whether the best attorneys were hired at a fair rate, and whether any improper relationships existed between a political subdivisions and attorneys." House Research Organization, Bill Analysis, H.B. 2826 (Apr. 30, 2019).

The Texas Constitution is a driving force behind the Legislature's careful scrutiny of these agreements. The Legislature confirmed this fact by expressly declaring as part of the 2019 amendments to the Government Code that the authorization to enter into contingent fee agreements was being granted "in accordance with [Section] 53, Article III, Texas Constitution." Tex. Gov't Code §2254.102. The Supreme Court has recognized that §53 "is intended to prevent the application of public funds to private purposes." *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928). Part of §53 bars the Legislature from paying claims asserted against "county or municipality" under a contract "made without authority of law." Tex. Const. art. III, §53.

In its 2019 amendment, the Legislature recognized that §53 authorizes the Legislature to provide the necessary legislative authority for a political subdivision to enter into a contingent fee contract—*i.e.*, §53 authorizes the Legislature to establish "the manner in which and the situations under which a [] political subdivision may compensate a public contractor under a contingent fee contract for legal services." Tex. Gov't Code §2254.102. But the Legislature did not confer that authority until 2019. Because the contingent-fee contracts here were executed prior to 2019, and because they do not otherwise conform to the requirements in section 2254.102 of the Government Code, they are not authorized by this recent grant of authority.

D. Mr. Lemon Has Engaged in the Same Tactics that Prohibitions on Contingent-Fee Tax Ferret Agreements Were Designed to Outlaw.

By the very terms of the Engagement, Mr. Lemon can be compensated if, and only if, he is able to raise Kinder Morgan's tax bill above where it was set by the Pecos County Appraisal District. While contingent fee agreements typically confine the terms to a portion of any settlement or judgment in favor of the client, Mr. Lemon's engagement as a tax ferret means that he is paid the same amount whether he achieves his goal through the courts, through attacks on the appraisal district, or through any other means. The incentives created by this engagement violate the goals

and constitutional protections at the heart of Texas's property tax system and have resulted in conduct that vindicates the public policy concerns surrounding tax ferret engagements.

1. Contingent Fee Tax Ferret Agreements Undermine Core Tenets of Property Taxation.

In Texas, ad valorem taxes are based on an appraisal conducted by a neutral, licensed, authorized appraiser. Tex. Tax Code § 6.05(c). Tax appraisers are statutorily required to appraise all taxable property at its "market value." Tex. Tax Code § 23.01, *see also id.* § 1.04(7) (defining market value). Tax appraisers are permitted to hire private firms to assist in the appraisal process, but the Tax Code provides that any contract that makes compensation contingent on the amount of tax revenue generated by the private firm's appraisals is void. Tex. Tax Code § 25.01(b). In determining market value, the Chief Appraiser for the Pecos County taxing units, like all Texas appraisers, must follow a Code of Ethics that requires an appraisal be "guided by the principle that property taxation should be fair and uniform," and all "laws, rules, methods, and procedures" be applied in a "uniform manner." Tit. 16 Tex. Admin. Code § 94.100. Among other benefits, this Code of Ethics divorces the personal profit motive of the appraiser from the appraisal and taxation process. *Id.*

Thus, the appraiser's role is to seek the accurate, fair market value of property. These requirements are consistent with the promise in the Texas Constitution that all taxation "shall be equal and uniform." Tex. Const. art. VIII § 1(a).

The Engagement would guarantee that Kinder Morgan would *not* be treated like other taxpayers by Mr. Lemon and would *not* receive the benefit of an "equal and uniform" system. Mr. Lemon can only be compensated if he succeeds in raising Kinder Morgan's tax bill. No other taxpayer in Pecos County—or possibly the state—is facing an attempt to have its tax bill set by a profit-motivated private entity. As outlined below, Mr. Lemon has responded to the pressures and

incentives of this structure in a manner that supports the public policy concerns surrounding tax ferrets. But irrespective of his conduct, the engagement letter should declared void—and ISISD's authority to enter into it should not be implied—because it creates a different system of taxation for a single taxpayer.

2. Mr. Lemon's Conduct Is Representative of Tax Ferrets.

In this proceeding, Mr. Lemon's conduct exemplifies the profit-driven, abusive, and harassing practices typical of a tax ferret. Much like the methods attributed to tax ferrets by the Kansas Supreme Court in *Fry* including "threats of public exposure," Mr. Lemon has accused Kinder Morgan of hiding these (publicly-filed) lawsuits "from Feds and Investors," implying that the failure to do so is some kind of violation of the law that is "just like Enron."[19] These false and inflammatory assertions have nothing to do with the facts of this case and were plainly intended to signal a "threat of public exposure"; *i.e.*, that Mr. Lemon planned tell the SEC and Kinder Morgan's lenders that Kinder Morgan was engaged in wrongdoing.

Indeed, Mr. Lemon has followed through on his threats. The day after Kinder Morgan set its TCPA Motion to Dismiss for hearing in December 2019, Mr. Lemon sent a disparaging letter to what is expected to be nearly two dozen of Kinder Morgan's lenders. One copy of the letter was sent to six different recipients at Barclays Bank and to the Bank's Texas agent for the service of process.[20] On the first page of the letter, which was styled as a "Taxing Unit Information Request" and carries other features intended to give the letter the color of authority, Mr. Lemon includes the

[19] Ex. E, First Supplement to Plaintiffs' Motion to Strike Kinder Morgan's TCPA Motion to Dismiss, at p. 10-11; *see also* Ex. F, Plaintiffs' Second Request for Production to the Kinder Morgan Defendants, at pp. 11-19 (requesting each document "reflecting why and how Kinder Morgan is not in violation of [credit agreement]" and requesting proof that each of over a dozen banks is aware of the litigation.).

[20] Ex. G, Letter Re: Taxing Unit Information Request - Kinder Morgan, Inc. Subsidiaries (Dec. 6, 2019).

provocative, but irrelevant, assertion that the Texas Tax Code provides taxing units with a "first priority lien" on any "unpaid ad valorem taxes."

> **Re: Taxing Unit Information Request – Kinder Morgan, Inc. and Subsidiaries**
>
> **Gentlemen:**
>
> **It is my understanding you represent an Arranger or participating party to two Revolving Credit Agreements with Kinder Morgan, Inc. dated November 16, 2018 and in the amounts of $4,000,000,000.00 and $500,000,000.00, respectively.**
>
> **The Texas Tax Code provides for a first priority lien that perfects automatically for any unpaid ad valorem taxes (including any interest and penalties). Tex. Tax Code, ch. 32. The lien exists in favor of each taxing unit having the power to tax the property. Tex. Tax Code § 32.01(a). The lien takes priority over any other creditor, even if that creditor's claim pre-dated the lien. Tex. Tax Code § 32.05(b).**

He goes on to explain that he represents a group of taxing units in cases against Kinder Morgan bringing claims "totaling approximately $401,000,000." He then asserts that "an independent and qualified appraiser" has determined that Kinder Morgan's Scurry County assets are undervalued by nearly $2 billion.[21] He does not explain why this "independent" appraiser has bothered to issue such an opinion.

The letter makes a series of document requests and continues Mr. Lemon's fixation on Enron and asks the bank for "[d]escribe the investigation performed and consideration given to the fact that Kinder Morgan evolved from Enron Corporation:[22]

[21] *Id.* p. 2.
[22] *Id.* p. 3.

2. As you are aware, many financial institutions (including current Arrangers and participating parties with Kinder Morgan) were required to make significant payments in settlement and/or fines relative to Enron Corporation, while others suffered huge financial losses due to the fraudulent schemes. Describe the investigation performed and consideration given to the fact that Kinder Morgan evolved from Enron Corporation and was founded by and is currently run by alumni of Enron Corporation, including Kinder Morgan's:

   a. Executive Chairman Richard Kinder (former Enron Director, COO, and President);

   b. Chief Executive Officer Steven Kean (former chief of staff to Enron CEO Ken Lay);

   c. Vice President and Chief Financial Officer David Michels;

   d. Vice President and Chief Strategy Officer Dax Sanders; and

   e. Vice President and Chief Tax Officer Jordan Mintz (the S.E.C. sought to bar Mintz from serving as a director or officer for any publicly-traded company based on the S.E.C.'s allegation that he "intentionally failed to disclose material information regarding related party transactions and related party executive compensation and made false and/or misleading statements to

The letter concludes with other requests about communications between Kinder Morgan and its banks, and Mr. Lemon's request for a written response within "thirty (30) days."[23]

Texas statutes govern the circumstances and manner in which bank records can be requested, and even if there were not a discovery stay in each of the cases referenced, Mr. Lemon cannot possibly have hoped that financial institutions would voluntarily submit confidential records about their customers and their business to a private individual. The letter, and the accompanying requests, can only be characterized as an attempt to embarrass Kinder Morgan, to interfere with its bank relationships, and to preview the scorched-earth litigation tactics that would result from Kinder Morgan's continued attempts to have the claims dismissed. Kinder Morgan was required to expend time and resources to address the request with banks that were unsure whether

[23] *Id.* p. 4.

the request had force of law. No other taxpayer in Pecos County is faced with such unprofessional and harassing conduct because no other taxpayer is the target of a tax ferret engagement.

Indeed, when Mr. Lemon is faced with a motion, discovery response, or scheduling request that he disagrees with, it is not uncommon for him to respond with the threat of sanctions, accusations, and conspiracy theories about Kinder Morgan, the motives of its counsel, and Enron.[24] Mr. Lemon has also accused Kinder Morgan of attempting to intimidate the members of the ISISD school board in 2018, but when Kinder Morgan refuted the allegation in a responsive brief that cited to actual evidence, Mr. Lemon stopped pursuing the motion, choosing instead to repeat the unsupported allegation in numerous filings.[25]

Even in response to Kinder Morgan's request that he demonstrate his authority to represent his clients on a contingent fee, Mr. Lemon responded with threats and accusations of bad faith and "nefarious intent."[26] Again, the only purpose of these repeated allegations and attempted insults is to harass and embarrass Kinder Morgan. These are classic tax ferret practices dating back over 100 years.

3. The Taxpayers and Residents of Pecos County Have Been Negatively Impacted by Mr. Lemon's Claim and His Scorched-Earth Litigation Tactics.

Mr. Lemon's litigation tactics have also had a tangible, negative impact on the taxpayers of Pecos County. The Pecos County Appraisal District ("PCAD") is a party to this case (and the 2018 case) and has been required to spend significant attorneys' fees in response to Mr. Lemon's litigation practices. In the 2018 case, Kinder Morgan filed a successful Plea to the Jurisdiction—

[24] Ex. H, Correspondence Re: "Enronesque" Position, Tabs H-1 through H-4.
[25] Ex. I, Nonparty Kinder Morgan Production Company LLC's Response to Plaintiff's Motion to Compel (Oct. 16, 2018).
[26] Ex. A, Letter Correspondence Re: Authority For Representation, Tab A-4, p. 1.

referred to as a "dilatory" tactic by Mr. Lemon before it was granted—that Mr. Lemon responded to by needlessly insisting that he needed to depose the PCAD's Chief Appraiser.[27]

Mr. Lemon also filed suit in Dallas County against the third-party appraiser used by PCAD, alleging damages for the negligent appraisal of Kinder Morgan's assets.[28] When PCAD's attorney appeared in the case to oppose third-party discovery issued by the Taxing Unit, Mr. Lemon challenged the attorney's authority under Rule 12.[29] Other maneuvers in Pecos County related to ISISD forced PCAD to retain a second attorney, at additional cost.[30] Mr. Lemon has also sent six different public information requests to PCAD seeking the same Kinder Morgan information, which all required objections and submissions to the Attorney General. The Attorney General upheld PCAD's denial of the requested information. PCAD has been required to expend public money to submit briefing to the Attorney General as to why the requested information is confidential and to defend PCAD in taxing-unit challenges by ISISD before the appraisal review board and in two lawsuits in this Court. As has been reported in the *Fort Stockton Pioneer*, Mr. Lemon's tactics have imposed a heavy burden of legal fees and expenses on PCAD and the taxpayers of Pecos County.

These costs only go to reduce the funds ultimately available to ISISD and the seven other taxing units in Pecos County, and they are costs that have been incurred only because Mr. Lemon has but one path to recouping the time and expenses poured into pursuing Kinder Morgan for the past two years—maximizing the tax bill of a lone taxpayer. The overall financial wellbeing of PCAD and its taxing units are not part of his mission. PCAD and its Chief Appraiser are statutorily

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[27] Ex. J, Email Correspondence Re: "Dilatory" Tactics.
[28] Ex. K, Plaintiff's Original Petition And Request for Disclosure, *Iraan-Sheffield Indep. School Dist. v. Thomas Y. Pickett & Co., Inc.*, Cause No. DC-18-01622, Dallas County (Feb. 5, 2018).
[29] Ex. L, Motion to Show Authority as to the Representation of the Pecos County Appraisal District Cause No. DC-18-01622, Dallas County (Sept. 24, 2018).
[30] Ex. M, *PCAD Special Meetings aren't so Special*, Ft. Stockton Pioneer (Aug. 2, 2018).

required to act in the interests of all taxing units participating in Pecos County, and PCAD has joined this motion.

These practices are the kind of contact that results from contingent fee tax ferret contracts, and are why the Legislature does not allow such contracts to be executed.

4. ISISD May Have Engaged an Additional Tax Ferret.

Mr. Lemon may not be acting alone. Articles in the *Snyder Daily News* include reports that a company called US Consults will receive 20% of any increase in tax revenues generated by Mr. Lemon's efforts in Scurry County or that Mr. Lemon and U.S. Consults, LLC would receive 40 percent of any settlement or award.[31] The *Snyder Daily News* has also reported that "Lemon and U.S. Consults, LLC" had made information requests to PCAD.[32] In light of these reports, Kinder Morgan asked Mr. Lemon in two separate letters to provide the details of any engagement with US Consults related to these suits, but Mr. Lemon did not acknowledge this request in either of his responses.[33]

Any involvement by Mr. Lemon in an unenforceable tax ferret arrangement with US Consults would be relevant to the issue of his authority. Given the strong circumstantial evidence involvement by US Consults, Mr. Lemon's burden of proof in establishing his authority to represent his client requires a full explanation of the role of US Consults in the engagement.

III. RULE 12 REQUEST TO SHOW AUTHORITY

When a party alleges that an attorney is prosecuting or defending a suit on behalf of another party without authority, the challenged attorney must appear before the court to show his authority to act. Tex. R. Civ. P. 12. The burden of proof is on the challenged attorney to show sufficient

[31] Ex. B, Snyder Daily News Articles, Tab B-1, B-2.
[32] *Id.*, Tab B-2.
[33] Ex. A, Letter Correspondence Re: Authority For Representation, Tab A-1, A-3.

authority to prosecute the suit on behalf of a party. *Id.* On failure to show authority, the court must refuse to permit the attorney to appear in the cause and must strike all the pleadings if no person authorized to prosecute appears. *Id.*; *Gulf Regional Educ. Television Affiliates v. University of Houston*, 746 S.W.2d 803, 809–10 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

Under Rule 12, the Court should cite Mr. Lemon and require him to appear for a hearing to show his authority to prosecute this matter on behalf of the Taxing Unit. As explained above, Mr. Lemon cannot meet his burden to demonstrate he has authority to represent the Taxing Unit in this case, because his contingency fee contract—to pursue this action alleging that Kinder Morgan's property was undervalued and therefore omitted from appraisal—is a tax ferret contract and is not permitted under the Tax Code.

IV. PLEA TO THE JURISDICTION

Under Tax Code §42.21, a taxing unit may appeal an ARB decision by "fil[ing] a petition for review with the district court within 60 days after the [taxing unit] received notice that a final order has been entered." Tex. Tax. Code §42.21, §42.031. Section 42.21 provides that "[f]ailure to timely file a petition bars any appeal." Tex. Tax. Code §42.21. "Compliance with § 42.21 is jurisdictional." *Appraisal Review Bd. v. International Church of Foursquare Gospel*, 719 S.W.2d 160, 160 (Tex. 1986) (per curiam). Thus, failure to file a petition within the time allowed by statute deprives the district court of jurisdiction. *Id.*; *Koll Bren Fund VI, LP v. Harris County Appraisal Dist.*, 2008 WL 525799, at *4 (Tex. App.—Houston [1 Dist.] 2008, pet. denied). A challenge to subject-matter jurisdiction cannot be waived and can be raised at any time. *Waco Independent School Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000) (per curiam).

Here, the Taxing Unit's efforts to appeal the ARB's denial of its Challenge Petition and the filing of the Original Petition in this Court are void because Mr. Lemon had no authority to represent the Taxing Unit. *See Alief ISD*, 1992 WL 43927 at *2; *Guerra*, 681 S.W.2d at 254.

Because the Original Petition is void act, the Taxing Unit did not timely appeal. Therefore, this Court is without jurisdiction. *See Appraisal Review Bd.*, 719 SW.2d at 160.

V. PRAYER

Kinder Morgan and PCAD ask this Court to set a hearing on this Motion to Show Authority and Plea to the Jurisdiction. Kinder Morgan and PCAD ask the Court to dismiss this case for lack of subject-matter jurisdiction. Alternatively, Kinder Morgan and PCAD ask the Court to find that Mr. Lemon cannot meet his burden to show sufficient authority to prosecute this suit on behalf of the Taxing Unit, refuse to permit Mr. Lemon to appear in this cause, and strike all the pleadings if no person who is authorized to prosecute appears. Kinder Morgan and PCAD further request all other relief this Court deems appropriate.

Respectfully submitted,

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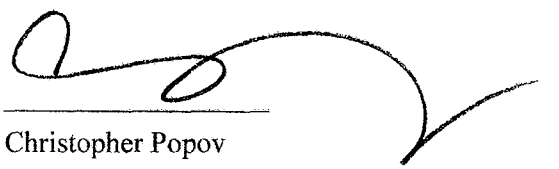
Austin, Texas 78731
jevans@lsejlaw.com

FOR PECOS COUNTY APPRAISAL DISTRICT

DECLARATION

My name is Christopher Popov, my date of birth is March 26, 1976, and my address is 1001 Fannin Street, Suite 2500, Houston, TX 77002, U.S.A. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, State of Texas, on January 24, 2020.

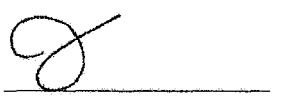


Christopher Popov

DECLARATION

My name is James R. Evans, my date of birth is March 31, 1955, and my address is 3305 Northland Drive, Suite 500, Austin, TX 78731, U.S.A. I declare under penalty of perjury that I believe this case is being prosecuted without authority.

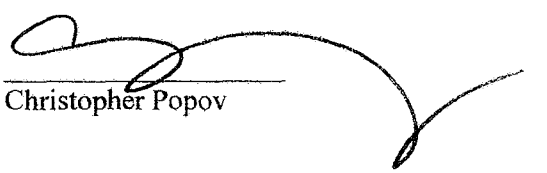
Executed in Travis County, State of Texas, on January 24, 2020.



James R. Evans, Jr.

CERTIFICATE OF CONFERENCE

I certify that, on January 2, 3, 7, and 9 of 2020, I conferred with D. Brent Lemon, purported counsel for Plaintiff Iraan-Sheffield Independent School District, and was informed Mr. Lemon opposes this Motion to Show Authority.



Christopher Popov

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2020, a true and correct copy of this document has been served on all counsel of record via e-filing as follows.

D. Brent Lemon
1201 Elm Street, Suite 4880
Dallas, Texas 75270
brent@dblemon.com

James R. Evans, Jr.
Low Swinney Evans & James, PLLC
3305 Northland Drive, Suite 500
Austin, Texas 78731
jevans@lsejlaw.com

/s/
Christopher Popov

Exhibit 5

Pecos County trial court's Order Granting Kinder Morgan's and Pecos County Appraisal District's Motion to Show Authority and Plea to the Jurisdiction

Filed: 2/6/2020 1:40 PM
Gayle Henderson,
District Clerk
Pecos County, Texas

Sylvia Guerra

P-8133-83-CV

IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT	§	IN THE DISTRICT COURT 2/6/2020
v.	§	
PECOS CO. APPRAISAL DISTRICT	§	
and	§	83rd JUDICIAL DISTRICT
KINDER MORGAN PRODUCTION CO., LLC, Individually and as Successor in Interest to KINDER MORGAN PRODUCTION CO., LP.	§	PECOS COUNTY, TEXAS

ORDER GRANTING KINDER MORGAN'S AND PECOS COUNTY APPRAISAL DISTRICT'S MOTION TO SHOW AUTHORITY AND PLEA TO THE JURISDICTION

On February 5, 2020, The Court heard and considered Kinder Morgan's and Pecos County Appraisal District's Motion to Show Authority, pursuant to Tex. R. Civ. P. 12, and Plea to the Jurisdiction (collectively, the "Joint Motion"), filed on January 24, 2020. Having considered the Joint Motion, any responses by Plaintiff Iraan-Sheffield Independent School District ("Plaintiff") and replies thereto, any supporting evidence admitted, the pleadings and papers on file with regard to the Motion, and arguments of counsel, the Court hereby ORDERS:

1. On the Motion to Show Authority, Mr. D. Brent Lemon has failed to establish sufficient authority to prosecute this suit on behalf of Plaintiff. Pursuant to Rule 12, Texas Rules of Civil Procedure, Mr. Lemon may not appear in this cause.

2. The Plea to the Jurisdiction is **GRANTED**. It is hereby **ORDERED** that the lawsuit and claims brought by Plaintiff in this cause are **DISMISSED WITH PREJUDICE**.

SIGNED this 6th day of February, 2020

Robert E. Cadena
JUDGE PRESIDING

Exhibit 6

Article titled, *Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies* (1922), from the National Petroleum News, from 1922

Claim Tax Ferrets Use Unfair Methods; Harass Tulsa Oil Companies

TULSA, April 22

By J. C. Chatfield
STAFF REPRESENTATIVE

WORKING from every possible angle, legal departments of oil companies throughout Oklahoma hope to obtain a definite limitation of the activities of tax ferrets within a short while. Numerous test cases are now in the county court of Tulsa county awaiting hearing and an opinion on the matter has been asked from George F. Short, attorney general.

For more than a year one of the heaviest burdens of the legal departments of oil companies in Tulsa, and a few other counties in the state has been that of resisting the activities of tax ferrets. They characterize the tactics of the ferrets as harassing. In filing its brief on the matter one company went so far recently as to paraphrase the statute defining blackmail in its charges of unfair practices of the ferret.

Under the state law a tax ferret is permitted to discover property which has been omitted from returns and not assessed. This he is supposed to list with the county treasurer. The duty of the treasurer is to notify the company or person owning the property that it has been discovered and give a certain number of days in which protests may be heard as to why the property should not be assessed. Under the contracts of county commissioners a tax ferret is allowed 15 per cent of all taxes collected as a result of his efforts.

Handling large numbers of properties it is but natural that a few items may be omitted from returns made by companies. When omitted properties are called to their attention the oil companies usually pay the tax without protest.

They Keep Up Income

But the tax ferrets do not have a profitable business if they confine their activities to the discovery of omitted property. They have taken other methods of increasing their income.

Going over the tax rolls the ferret finds a property and notes its assessed valuation. He then makes his own private valuation of the property and asks the treasurer to notify the company that the assessment will be raised.

It is the contention of the oil company attorneys that under the law the ferret has no jurisdiction in such cases and that neither he nor the county treasurer can re-assess any property at a higher figure, than has been assessed in the regular manner by the county assessor.

In this connection one of the serious complaints is that ferrets will approach the oil operators after sending out notices of increased assessments and offer to settle the matter for a sum much less than he has set upon the books of the county treasurer. It is stated that many companies, rather than enter a lengthy legal battle, have paid these settlements and thus increased the revenue of the ferrets.

Can't Bring Direct Charges

No direct charges can be brought against the ferrets as individuals since in every case the settlements are paid direct to the county and the county commissioners then pay the ferret his percentage.

Oil company attorneys take the position that the taxes should be the full amount charge dagainst them by the ferret or the amount assessed by the county assessor and that compromises and settlements are either an injustice to the county or to the tax payer.

Blanket notices to companies which do not set up any definite property discovered or any amount of assessment to be made are made the basis of more controversies and appeals than any other activity of the ferrets.

Several months ago notices were sent to virtually every company operating in Tulsa county. The notices were printed forms stating that the capital surplus and undivided profits of the company for a number of years had been omitted from returns for taxation purposes. The notices were signed with a rubber stamp fac-simile of the signature of the county treasurer.

Borrowed Signature Stamp

Investigation showed that the tax ferret had borrowed the signature stamp and sent out the notices on his own initiative without having previously made a report to the treasurer of specific property omitted and his valuation of it.

In no case on record, according to the attorneys representing oil operators, did either the tax ferret or the county treasurer have figures showing the actual capital surplus or undivided profits of the corporation which they charged had been omitted. It is stated that the amounts set up in some cases have been mere guesses.

Subpoenas *duces tecum* have been issued in an effort to force the taxpayers to bring their books into court or into the office of the county treasurer. It has been the thought of the tax ferret that if he could get the books of all corporations thrown open for his inspection he might be able to find a number of angles from which he might attack the companies to demand more taxes. It is the contention of the corporations that the tax ferret had no business inspecting their accounts.

In every case appeals have been taken where the blanket notices have been sent out demanding declaration of capital surplus and undivided profits without stating the actual property omitted from return for taxation. These appeals are now in the county court and the companies are paying for bonds while the litigation drags out.

Ferrets Harass Companies

One serious complaint is that the ferrets and county treasurers harass the operators over considerable periods of time in order to force settlement without court action. Notices are sent out demanding that protests be filed before a certain date and a hearing be held on that date. When the companies come in on the date set either the ferret or the treasurer is not on hand and the matter is continued to a later date. In some cases it is stated that attorneys have been to the courthouse as many as six or eight times without getting a hearing. That system has caused the loss of days of valuable time of the important officers and employees of corporations.

It is the contention of tax ferrets that taxes should be paid on deposits in banks and accounts receivable on the first day of the year. No deductions from accounts receivable are allowed for current bills payable. A company with $500,000 in accounts receivable on Jan. 1, might very well have bills to meet during the first 10 days of the month aggregating $400,000. Its net accounts receivable would be only $100,000 and yet contention of the tax ferret is that the company should pay taxes on the entire half million dollars without reference to its bills for operating expense or equipment.

It is generally conceded that taxes are not paid on cash on hand in banks on the day opening the taxable period. Few, if any, individuals or corporations pay on their money, chiefly because of the fact that it is such a variable quantity and does not reflect the true condition of the resources of an organization. It may represent funds accumulated for the purchase of a new property, for the payment of accounts or it may represent an accumulation of profits.

Valuations 40 to 60 Per Cent

Under a strict interpretation of the law, all property should be assessed at its full market value. But practice is that no property is ever assessed for its full value. Usually the valuation runs from 40 to 60 per cent. Individuals and corporations are advised by the county assessor not to return a full value, but rather a certain percentage.

When the legal assessor of a county advises the taxpayers what to return and the custom is followed by all it gives color to the assertions of corporation attorneys that the tactics of tax ferrets are unjust when such attempts as are outlined above are made.

Unless relief is obtained from the courts or an opinion from the attorney general it is conceded that the corporations operating in Tulsa particularly, must take some steps to avoid the harassing. Companies with their principal place of business in the country are the only ones sent blanket notices on omission of capital surplus and undivided profit taxes. Companies with headquarters in other states are chiefly harassed by the ferrets in making increased valuations on properties assessed by the county assessor.

Tulsa companies may be forced to make arrangements to have no money in the bank on Jan. 1, and to make some disposition of their accounts so that few, if any, bills shall be payable in the first few days of January.

The Tulsa county tax ferret appears to believe that ferreting is a good business. He is not a citizen of Tulsa county, but came in because he knew of the large number of oil companies here. He is now expanding his work throughout the state and making contracts either in his own name, or that of someone he hires, in other counties where oil companies are located according to statements made here. It is charged that the tax ferret in Payne county, in which a large part of the Cushing pool is situated, is merely an em-

ployee of the Tulsa man. It is declared that he has gone into Muskogee as a promising field and has his eye on Okmulgee and other counties.

A great deal of the success of a tax ferret depends on the attitude of the county treasurer. Some treasurers will not send notices to taxpayers unless specific omitted property is discovered and will not permit the ferret to send them out over his signature. In such counties the ferret's style is cramped and he does not prosper if merely finding forgotten property.

Central Storage Saves Time For Customers

Staff Special

CHICAGO, April 28.—Part of the marketing program of the big oil dealers to give customers prompt service in sections remote from fields of production is to keep large stocks on hand, but only a few of them have carried this to the extent of building large storage as have some of the companies in Chicago. A 55,000-barrel tank at Chicago is usually kept full of gas oil so the commodity may be supplied in any quantity promptly by Acme Petroleum Co., from Chicago.

Besides Acme, Standard of Indiana, Sinclair and Gustafson & Spencer have such facilities in this section. The Acme's tank stands in the middle of a 11-acre tract at Blue Island, Ill., and is used for gas oil exclusively. Acme's fuel oil tank of like size is in West Tulsa, Okla. Authorities of the company estimate that the tank at Blue Island saves their customers in the north five to 10 days on every gas oil order.

Often the saving is even more than that when there are floods, car congestions or other rail handicaps. It is not impossible for a buyer to have his car loaded and on the move and be advised of the car number, three hours after the order is placed. Such service from field storage would be almost impossible even if the company's offices were near.

A loading rack with a track on both sides of it, capable of loading 30 cars at once in an emergency, is built along the edge of the property, which is sufficiently large to accommodate four more 55's, when the company wants to complete the Chicago tank farm. The gas oil tank is equipped with welded steam coils inside and by turning on a full head of steam the oil can be warmed so that it may be loaded in any weather.

President C. O. Bereth says the convenient loading facilities save a great deal in outages, because a car often may be allowed to stand a day after it is loaded, and the oil allowed to acquire the temperature of the air before it is gaged, or enough oil to take care of the shrinkage, added after the load has cooled.

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* **OWATONNA, MINN., April 27.**—Ed C. Zamboni, owner of the Zam Oil Co. of Owatonna, is organizing a company at Kasson, Minn., to be known as the Dodge County Oil Co. Equipment for a bulk station has been ordered. He is purchasing manager.

Continued on Opposite

Exhibit 7

National Conference of State Legislatures' Resolution Concerning the Use of Contingent Fee Arrangements in Tax Audits and Appeals, dated September. 30, 2011

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

RESOLUTION CONCERNING THE USE OF CONTINGENT FEE ARRANGEMENTS IN TAX AUDITS AND APPEALS

NCSL EXECUTIVE COMMITTEE TASK FORCE ON STATE & LOCAL TAXATION OF COMMUNICATIONS AND ELECTRONIC COMMERCE

WHEREAS, taxes are one of the most sensitive points of contact between citizens and their government, and there is a delicate balance between efforts to effectuate revenue collection and freedom from government harassment; and

WHEREAS, although compliance with state tax statutes and regulations is subject to audit scrutiny, the percentage of taxpayers actually audited is small, and as a result, our federal and state tax systems are premised, to a great degree, on voluntary compliance; and

WHEREAS, the implementation of tax statutes must be transparent in order to improve voluntary compliance, reduce the costs to states of administration of those taxes, and improve the relationship between taxpayers and their government representatives; and

WHEREAS, it is incumbent upon governments to ensure that the rights, privacy and property of our taxpayers are adequately protected during the process of the assessment and collection of taxes; and

WHEREAS, the purpose of any audit of a taxpayer or proceeding between government and a taxpayer is the determination of the taxpayer's correct amount of tax liability, and correspondingly, whether the return as filed was accurate; and

WHEREAS, a properly conducted audit should serve three purposes: to determine the accuracy of a particular tax return, to create an incentive for all taxpayers to comply with the tax law, and to educate taxpayers about their future tax compliance obligations; and

WHEREAS, to conduct an audit that accomplishes these goals, the audit should be based on an actual review of the taxpayer's books and records, designed to determine whether the taxpayer has over or under paid, or has reported the correct amount of tax.

WHEREAS, by contracting with third parties to conduct taxpayer audits on a contingent fee basis, governments may provide an incentive to the third-party auditor to arbitrarily inflate a taxpayer's liability because a larger audit assessment results in a larger payment to the auditor; and

WHEREAS, contingent fee arrangements may encourage auditors to be overly aggressive, to interpret tax statutes to their own monetary advantage rather than in a fair and just manner, to "cherry pick" taxpayers as audit targets and to ignore taxpayer errors that would result in lower assessments; and

WHEREAS, government use of contingent fee arrangements in tax audits and appeals denies the transparency that taxpayers are owed and demand, creates a perception of unfairness that undermines taxpayers' relationships with tax administrators and fosters an atmosphere of mistrust that hinders voluntary compliance.

THEREFORE, LET IT BE RESOLVED, that the National Conference of State Legislatures opposes the use of contingency fee arrangements for the conduct of taxpayer audits as well as arrangements with firms or organizations that rely on economic assumptions rather than on an actual or statistical review of a taxpayer's books and records, in tax audits and appeals and encourages governments to end such contingency fee practices where they exist.

Adopted Unanimously by the NCSL Executive Committee Task Force on State and Local Taxation of Communications and Electronic Commerce, September 30, 2011

Exhibit 8

Excerpts from the Taxing Units' discovery requests to Kinder Morgan in this case

NO. 26719

SCURRY COUNTY;	§	IN THE DISTRICT COURT
	§	
SNYDER INDEPENDENT SCHOOL DISTRICT;	§	
	§	
SCURRY COUNTY JUNIOR COLLEGE DISTRICT d/b/a WESTERN TEXAS COLLEGE;	§	
	§	
SCURRY COUNTY HOSPITAL DISTRICT d/b/a COGDELL MEMORIAL HOSPITAL	§	132nd JUDICIAL DISTRICT
	§	
v.	§	
	§	
SCURRY CO. APPRAISAL DISTRICT	§	
	§	
and	§	
	§	
KINDER MORGAN CO2 CO., LP Individually and as Successor in Interest to KINDER MORGAN SACROC, LP; and KINDER MORGAN PRODUCTION CO., LLC, Individually and as Successor in Interest to KINDER MORGAN PRODUCTION CO., LP	§	SCURRY COUNTY, TEXAS

PLAINTIFFS' SECOND REQUEST FOR PRODUCTION TO THE KINDER MORGAN DEFENDANTS

To: Kinder Morgan CO2 Company, LP, Individually and as Successor in Interest to Kinder Morgan SACROC, LP and Kinder Morgan Production Company, LLC, Individually and as Successor in Interest to Kinder Morgan Production Company, LP.

Pursuant to Rule 196 of the TEXAS RULES OF CIVIL PROCEDURE, you are requested to produce all of the documents described in the attached list which are in your possession, custody or control within thirty (30) days of service at the Law

31. Each document reflecting why and how Kinder Morgan is not in violation of Section 2.16(c) of its $4,000,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;
e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;
o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

32. Each document reflecting why and how Kinder Morgan is not in violation of Section 4.05 of its $4,000,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;

e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;
o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

33. Each document reflecting why and how Kinder Morgan is not in violation of Section 4.06 of its $4,000,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;
e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;

o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

34. Each document reflecting why and how Kinder Morgan is not in violation of Section 5.01(d) of its $4,000,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;
e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;
o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

35. Each document reflecting why and how Kinder Morgan is not in violation of Section 6.01(d) of its $4,000,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;
e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;
o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

36. Each document reflecting why and how Kinder Morgan is not in violation of Section 6.02 of its $4,000,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;

e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;
o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

37. Each document reflecting why and how Kinder Morgan is not in violation of Section 4.05 of its $500,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;
e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;

o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

38. Each document reflecting why and how Kinder Morgan is not in violation of Section 4.06 of its $500,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;
e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;
o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

39. Each document reflecting why and how Kinder Morgan is not in violation of Section 5.01(d) of its $500,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;
e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;
o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

40. Each document reflecting why and how Kinder Morgan is not in violation of Section 6.01(d) of its $500,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;

e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;
o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

41. Each document reflecting why and how Kinder Morgan is not in violation of Section 6.02 of its $500,000,000 REVOLVING CREDIT AGREEMENT dated as of November 16, 2018, including but not limited to documents from each of the following financial institutions that corroborate that each is aware of this litigation:

a. Barclays Bank PLC;
b. JPMorgan Chase Bank, N.A.;
c. Bank of America, N.A.;
d. BMO Harris Bank, N.A.;
e. CitiGroup Global Markets Inc.;
f. Credit Suisse AG;
g. Cayman Islands Branch;
h. Mizuho Bank, LTD.;
i. MUFG Bank, LTD.;
j. Royal Bank of Canada;
k. The Bank of Nova Scotia;
l. Houston Branch;
m. Wells Fargo Bank;
n. National Association;

o. Wells Fargo Securities, LLC;
p. RBC Capital Markets;
q. Merrill Lynch;
r. Pierce, Fenner & Smith Incorporated;
s. Credit Suisse Securities (USA) LLC;
t. BMO Capital Markets Corp.; and
u. JPMorgan Securities LLC.

RESPONSE:

42. Each document corroborating Kinder Morgan's representation in its 10-K and other SEC-governed documents that its original oil in place (OOIP) for SACROC was originally a total of 2.8 billion barrels and per its SEC-governed documents in 2019 that the total has been increased by 700 million barrels.

RESPONSE:

43. Each document since January 1, 2012 reflecting any appraisal prepared by a non-related-party of the Kinder Morgan SACROC mineral interest real property.

RESPONSE:

44. Each document reconciling Kinder Morgan's representation in SEC filings that it owns 97% interests in SACROC with Kinder Morgan's representation to the Scurry County Appraisal District that the Kinder Morgan interests (NRI) are approximately 83%.

RESPONSE:

45. Each document since January 1, 2018 reflecting the Lease Operating Statement and operating expenses (including but not limited to lifting costs) provided to royalty owners of mineral interest real property in which Kinder Morgan owns a working interest in Scurry County, including but not limited to those royalty interests owned by Family Limited Ptnr (2626 Howell St, Dallas, TX), and LLC (PO Box 900, Artesia, NM).

RESPONSE:

Exhibit 9

Mr. Lemon's "Taxing Unit Information Request - Kinder Morgan, Inc. and Subsidiaries" to Barclays, dated December 6, 2019

LAW OFFICE OF D. BRENT LEMON

Renaissance Tower
1201 Elm Street, Suite 4880
Dallas, Texas 75270
www.dblemon.com

Voice (214) 747-2277 Fax (214) 747-2280

December 6, 2019

Barclays Bank PLC
Attention: Patrick Shields
745 Seventh Avenue, 27th Floor
New York, New York 10019

VIA CM/RRR #7196 9008 9111 7184 0909

Barclays Bank PLC
Attention: Bobby Fitzpatrick
400 Jefferson Park
Whippany, New Jersey 07981

VIA CM/RRR 7196 9008 9111 7184 0916

Re: **Taxing Unit Information Request** – Kinder Morgan, Inc. and Subsidiaries

Gentlemen:

It is my understanding you represent an Arranger or participating party to two Revolving Credit Agreements with Kinder Morgan, Inc. dated November 16, 2018 and in the amounts of $4,000,000,000.00 and $500,000,000.00, respectively.

The Texas Tax Code provides for a first priority lien that perfects automatically for any unpaid ad valorem taxes (including any interest and penalties). Tex. Tax Code, ch. 32. The lien exists in favor of each taxing unit having the power to tax the property. Tex. Tax Code § 32.01(a). The lien takes priority over any other creditor, even if that creditor's claim pre-dated the lien. Tex. Tax Code § 32.05(b).

I represent a county, two school districts, a hospital, and a college ("Taxing Units") in the following cases against Kinder Morgan, Inc. and/or its subsidiaries ("Kinder Morgan") relative to the valuation of and tax assessment on mineral interest real property located in Scurry County, Texas and Pecos County, Texas:

Cause No. P-7943-83-CV; *Iraan-Sheffield Independent School District v. Pecos County Appraisal District and Kinder Morgan Production Company, LLC, Individually and as Successor in Interest to Kinder Morgan Production Company, LP* – Filed 08/28/18;

Cause No. 26387; *Scurry County, Snyder Independent School District, Scurry County Junior College District d/b/a Western Texas College, and Scurry County Hospital District d/b/a Cogdell Memorial Hospital v. Scurry County Appraisal District, Kinder Morgan CO2 Company, LP, Individually and as Successor in Interest to Kinder Morgan SACROC, LP, and Kinder Morgan Production Company, LLC, Individually and as Successor in Interest to Kinder Morgan Production Company, LP* – Filed 08/23/18;

Cause No. P-8133-83-CV; *Iraan-Sheffield Independent School District v. Pecos County Appraisal District and Kinder Morgan Production Company, LLC, Individually and as Successor in Interest to Kinder Morgan Production Company, LP* – Filed 09/12/19; and

Cause No. 26719; *Scurry County, Snyder Independent School District, Scurry County Junior College District d/b/a Western Texas College, and Scurry County Hospital District d/b/a Cogdell Memorial Hospital v. Scurry County Appraisal District, Kinder Morgan CO2 Company, LP, Individually and as Successor in Interest to Kinder Morgan SACROC, LP, and Kinder Morgan Production Company, LLC, Individually and as Successor in Interest to Kinder Morgan Production Company, LP* – Filed 09/12/19.

I am enclosing a copy of the opinion issued in *Kinder Morgan SACROC, LP v. Scurry County*, No. 11-19-00097-CV, 2019 WL 5800308 (Tex. App.—Eastland Nov. 7, 2019, no pet. h.), which generally describes the litigation and basis of the claims now totaling approximately $401,000,000.00 for both counties, excluding interest and penalties. Tex. Tax Code §§ 22.29, 33.01. **(Exh. A)**

As mentioned, the pending litigation involves the valuation and taxation of Kinder Morgan mineral interest real property in the two counties. There appears to be some inconsistency between the values as calculated using Kinder Morgan state and federal filings and the representation of data and values by Kinder Morgan to the local tax appraisal districts. In Scurry County alone, an independent and qualified appraiser has valued the mineral interest real property of Kinder Morgan to be $2,161,036,123.00, relying upon Kinder Morgan state and federal filings/representations. Nevertheless, Kinder Morgan has asserted by its partial payment of taxes assessed that the Scurry County mineral interest real property has a value of approximately $325,000,000.00. The Kinder Morgan ad valorem asserted value is particularly perplexing in light of page 41 of the January 23, 2019 Kinder Morgan Investor Presentation referencing "**Big Fields Get Bigger,**" "**SACROC – 2.8 billion barrels of original oil in place,**" and an "**Estimated incremental 700 mmbbls OOIP target.**" **(Exh. B)** Likewise, former Chief Financial Officer and current President Kim Dang stated the following in the Earnings Call of July 17, 2019:

"At SACROC which accounts for almost two-thirds of our current production, production was up 1% in the quarter, and we expect to be above budgeted volumes for the year. So nice current performance in SACROC. When you look at the longer term, the story has also improved. In our mid-year reserve review, SACROC proved reserves increased by about 5.5 million barrels, which represents approximately 33% increase improved reserves.

This was driven primarily by increased recovery factors as a result of increased performance."

(Exh. C)

In light of the apparent inconsistency between the information provided by Kinder Morgan in state and federal filings/representations and the information provided by Kinder Morgan to local tax appraisal districts, I am seeking clarification and information into the above and other issues. Please provide written response to the following inquiries within thirty (30) days of receipt of this request:

1. Since January 1, 2017, has Kinder Morgan provided your financial institution any written notice of the existence of the above claims or litigation? If so, when and what was the content of the disclosure? If not, please advise why and how Kinder Morgan is not in violation of Sections 2.16(c), 4.05, 4.06, 5.01(d), 6.01(d), and/or 6.02 of the Revolving Credit Agreements dated November 16, 2018. Further, if Kinder Morgan is in violation of those Sections, have you provided a copy of the notice of same to a Responsible Officer as defined in the Revolving Credit Agreements?

2. As you are aware, many financial institutions (including current Arrangers and participating parties with Kinder Morgan) were required to make significant payments in settlement and/or fines relative to Enron Corporation, while others suffered huge financial losses due to the fraudulent schemes. Describe the investigation performed and consideration given to the fact that Kinder Morgan evolved from Enron Corporation and was founded by and is currently run by alumni of Enron Corporation, including Kinder Morgan's:

    a. Executive Chairman Richard Kinder (former Enron Director, COO, and President);

    b. Chief Executive Officer Steven Kean (former chief of staff to Enron CEO Ken Lay);

    c. Vice President and Chief Financial Officer David Michels;

    d. Vice President and Chief Strategy Officer Dax Sanders; and

    e. Vice President and Chief Tax Officer Jordan Mintz (the S.E.C. sought to bar Mintz from serving as a director or officer for any publicly-traded company based on the S.E.C.'s allegation that he "intentionally failed to disclose material information regarding related party transactions and related party executive compensation and made false and/or misleading statements to

auditors and the public regarding Enron's related party entities." *U.S. Securities & Exch. Comm'n v. Mintz*, No. H-07-1027, 2008 WL 11408489, at *9 (S.D. Tex. Feb. 5, 2008)).

3. Since January 1, 2013, has Kinder Morgan notified your financial institution of a significant reduction in the value of its mineral interest real property in the Permian Basin (including SACROC and Yates)? If so, what was the amount of the reduction/devaluation and what terms and conditions of the Revolving Credit Agreements were amended accordingly?

4. In relation to the execution of the Revolving Credit Agreements, did Kinder Morgan make any representations to you as to the value of its mineral interest real property in the Permian Basin (including SACROC and Yates)? If so, what was the value represented by Kinder Morgan? Have the values of the mineral interest real property at any time been audited? If so, what was the result of any such audit?

5. Since January 1, 2013, has Kinder Morgan ever provided to your financial institution written notice of its intent or efforts to market and sell its mineral interest real property in the Permian Basin? If so, when and what was the content of the disclosure? What was the Kinder Morgan requested sales price and the amounts of any third-party submitted bids for purchase?

6. What investigation was performed and what other steps were taken based on the fact that the Colorado Supreme Court recently affirmed the finding that Kinder Morgan owed significant unpaid property taxes due to inaccurate expense reporting? *Kinder Morgan CO2 Co. v. Montezuma County Bd. of Comm'rs*, 396 P.3d 657, 667-68 (Colo. 2017).

I look forward to your written response within thirty (30) days from your receipt of this request. Please feel free to contact me with any questions.

Thank you for your attention and cooperation.

Very truly yours,

D. Brent Lemon

DBL/kh

cc: C.S. Venkatakrishnan
Barclays Bank, PLC
745 Seventh Avenue, 27th Floor
New York, NY 10019
VIA CM/RRR #7196 9008 9111 7184 0923

Christine Cho
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2019 WL 5800308
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Eastland.

KINDER MORGAN SACROC, LP; Kinder Morgan CO2 Co., LP; Kinder Morgan Production Co., LP; and Kinder Morgan Production Co., LLC, Appellants

v.

SCURRY COUNTY; Snyder Independent School District; Scurry County Junior College District d/b/a Western Texas College; and Scurry County Hospital District d/b/a Cogdell Memorial Hospital, Appellees

No. 11-19-00097-CV

Opinion filed November 7, 2019

Synopsis

Background: After the Appraisal Review Board denied appraisal challenges brought by counties and school districts (taxing units), which alleged mineral interest owners undervalued mineral interests, taxing units filed petition for review and for mandamus relief in the 132nd District Court, Scurry County, No. 26387, requesting the court reappraise the mineral interests. The District Court denied mineral interest owners' motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). Mineral interest owners appealed.

Holdings: The Court of Appeals, Bailey, C.J., held that:

[1] "fair notice" standard of pleading controlled determination of whether taxing units had asserted a new legal action in their second amended petition;

[2] taxing units' second amended petition alleging owners fraudulently omitted interests from appraisal roll did not amount to new legal action; and

[3] owners failed to establish good cause to extend time for filing TCPA motion to dismiss.

Affirmed.

West Headnotes (21)

[1] **Appeal and Error**
Anti-SLAPP laws

The Court of Appeals reviews de novo a trial court's ruling on a motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et seq.

[2] **Appeal and Error**
Anti-SLAPP laws

In conducting review of trial court's denial of the Texas Citizens Participation Act (TCPA) motion to dismiss, the Court of Appeals considers pleadings and supporting evidence in light most favorable to nonmovant. Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a).

[3] **Pleading**
Application and proceedings thereon

A party who fails to timely file a Texas Citizens Participation Act (TCPA) motion to dismiss forfeits the protections of the statute. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et. seq.

[4] **Pleading**
Application and proceedings thereon

An amended pleading that does not add new parties or claims does not restart the deadline for filing a Texas Citizens Participation Act (TCPA) motion to dismiss, but an amended petition asserting claims based upon new factual allegations may reset a TCPA deadline as to the newly added substance. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et. seq.

[5] **Pleading**

Exh. A

Application and proceedings thereon

Additional factual details in an amended petition do not restart the time for filing a Texas Citizens Participation Act (TCPA) motion to dismiss if the same essential factual allegations as to the claim were presented in an earlier petition; likewise, asserting claims in an amended petition that are a "subset" of the claims in the original petition does not reset the deadline to file a TCPA motion to dismiss. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et. seq.

[6] **Pleading**

Application and proceedings thereon

No provision of the Texas Citizens Participation Act (TCPA) permitted Court of Appeals or the trial court to consider outside claims or actions to determine whether counties and school districts (taxing units) asserted a new "legal action" in amended pleading that would reset the deadline for mineral interest owners to file a TCPA motion to dismiss, even though both parties in their briefs relied on separate litigation brought by counsel representing government entities against mineral interest owners in another county. Tex. Civ. Prac. & Rem. Code Ann. § 27.006(a).

[7] **Pleading**

Nature and mode of pleading in general

Pleadings are intended to give the other side notice of the party's claims and defenses, as well as notice of the relief sought.

[8] **Pleading**

Sufficiency of allegations in general

Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. Tex. R. Civ. P. 45, 47(a).

[9] **Pleading**

Sufficiency of allegations in general

The purpose of rule providing fair notice standard for pleadings is to give the opposing party information sufficient to enable him to prepare a defense. Tex. R. Civ. P. 45, 47(a).

[10] **Pleading**

Statement of cause of action in general

A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. Tex. R. Civ. P. 45, 47(a).

[11] **Pleading**

Matters of evidence

The fair notice standard does not require a plaintiff to set out in his pleadings the evidence upon which he relies to establish his asserted cause of action. Tex. R. Civ. P. 45, 47(a).

[12] **Pleading**

Presumptions and inferences in aid of pleading

Under the fair notice standard for pleading, even the omission of an element is not fatal if the cause of action may be reasonably inferred from what is specifically stated. Tex. R. Civ. P. 45, 47(a).

[13] **Pleading**

Construction in General

When no special exceptions are filed, courts must construe the pleadings liberally in favor of the pleader; however, this liberal construction does not require us to read into a petition what is plainly not there. Tex. R. Civ. P. 45, 47(a).

[14] **Pleading**

Application and proceedings thereon

The "fair notice" standard of pleading controlled determination of whether counties and school districts (taxing units) had asserted a new "legal action" in their second amended petition that was not asserted in the original petition, that was

sufficient to reset the filing period for mineral interest owners' Texas Citizens Participation Act (TCPA) motion to dismiss taxing units' action to review appraised value of mineral interests; other than when a nonmovant relied on its pleading as clear and specific evidence of a prima facie case of each essential element of a claim, the TCPA did not impose a heightened pleading requirement.

[15] **Taxation**

⇐ Nature of property tax

Taxation

⇐ Taxation According to Value

An "ad valorem tax" is a tax on property at a certain rate based on the property's value. Tex. Tax Code Ann. § 6.01(b).

[16] **Taxation**

⇐ Additional or supplemental assessment and original assessment of property omitted

Omitted property, under the sections of the Property Tax Code dealing with appraisals and assessments, includes property that has been improperly exempted from the tax roll and property undervalued due to taxpayer fraud. Tex. Tax Code Ann. § 25.21.

[17] **Taxation**

⇐ Additional or supplemental assessment and original assessment of property omitted

County appraisal district and its chief appraiser have a nondiscretionary duty to back-appraise property that has been erroneously omitted from the appraisal roll. Tex. Tax Code Ann. § 25.21.

[18] **Taxation**

⇐ Additional or supplemental assessment and original assessment of property omitted

Taxation

⇐ Persons entitled

A taxing unit has standing under the Tax Code to challenge the appraisal district's and chief appraiser's failure to back-appraise improperly excluded property. Tex. Tax Code Ann. § 41.01 et seq.

[19] **Pleading**

⇐ Application and proceedings thereon

Second amended petition filed by counties and school districts (taxing units), which specifically pleaded that mineral interest owners omitted certain interests from county appraisal rolls due to fraudulent misrepresentation did not amount to a new legal action resetting statutory time period for owners to file a Texas Citizens Participation Act (TCPA) motion to dismiss, even though owners contended that second amended petition was first specific allegation of fraud; original petition gave "fair notice" to owners of taxing units' claim that they had omitted certain of their interests from appraisal roll and second amended petition merely refined and narrowed original claim, and taxing units did not assert common law fraud, rather that owners' interests were undervalued under the Tax Code. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et. seq.; Tex. Tax Code Ann. §§ 25.01 et seq., 41.01 et seq.; Tex. R. Civ. P. 45, 47(a).

[20] **Appeal and Error**

⇐ Discretion of lower court; abuse of discretion

The Court of Appeals reviews the trial court's decision to deny an extension of time to file the motion to dismiss for an abuse of discretion.

[21] **Pleading**

⇐ Application and proceedings thereon

Mineral interest owners failed to establish good cause to extend time for filing Texas Citizens Participation Act (TCPA) motion to dismiss petition filed by counties and school districts (taxing units) alleging owners had fraudulently omitted certain interests from county appraisal rolls, even though owners contended that taxing units' claims had changed and that their motion to dismiss under the general civil rule was timely;

owners could have simultaneously filed special exceptions to require greater specificity in taxing units' pleading, a standard motion to dismiss, and a TCPA motion to dismiss, and their intentional choice to proceed with serial motions caused a delay of over six months in the resolution of the case. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et seq.; Tex. R. Civ. P. 91a.

On Appeal from the 132nd District Court, Scurry County, Texas, Trial Court Cause No. 26387

Attorneys and Law Firms

D. Brent Lemon, Dallas, for Appellees.

Kirk Swinney, Round Rock, for Scurry Co. Appraisal Disrict.

Catherine B. Smith, James L. Leader Jr., Houston, Harper Estes, Midland, B. Jack Shepherd, Mark C. Rodriguez, Leslie Gardner, for Appellant.

Panel consists of: Bailey, C.J., Stretcher, J., and Wright, S.C.J.[5]

OPINION

JOHN M. BAILEY, CHIEF JUSTICE

*1 This appeal arises out of a proceeding wherein several governmental entities are seeking to have mineral interests reappraised by the county appraisal review board. Appellees, Scurry County, Snyder Independent School District, Scurry County Junior College District d/b/a Western Texas College, and Scurry County Hospital District d/b/a Cogdell Memorial Hospital, each filed a challenge to the appraisal roll for mineral interest property located in Scurry County, including the mineral interests of Appellants, Kinder Morgan SACROC, LP; Kinder Morgan CO2 Co., LP; Kinder Morgan Production Co., LP; and Kinder Morgan Production Co., LLC. Appellees filed these challenges with the Scurry County Appraisal Review Board. After the Appraisal Review Board denied the challenges, Appellees filed a petition for review and for mandamus relief in the district court. Appellees requested that the district court "fix" the correct value of Appellants' mineral interests and require the Appraisal Review Board to reappraise the mineral interests. More than one hundred days after being served with the original petition, Appellants filed a motion to dismiss pursuant to the Texas Citizens Participation Act. TEX. CIV. PRAC. & REM. CODE ANN. ch. 27 (West 2015) (the TCPA).[1] The trial court denied the motion as untimely.

In their first issue, Appellants assert that the trial court erred when it determined that the motion to dismiss was untimely. Alternatively, Appellants contend in their second issue that the trial court abused its discretion when it found that Appellants failed to demonstrate good cause to extend the time to file the motion to dismiss. We affirm the trial court's denial of Appellants' motion to dismiss.

Background Facts

Pursuant to Section 23.175 of the Tax Code, the Texas comptroller has adopted a method to appraise the value of mineral interests for purposes of assessing ad valorem taxes. *See* TEX. TAX CODE ANN. § 23.175 (West Supp. 2018). The Scurry County Appraisal District hired Thomas Y. Pickett & Co., Inc. (Pickett) to appraise the value of the mineral interests of Appellants and other entities in Scurry County. Stephen Campbell, an appraiser with Pickett, used the method adopted by the comptroller to conduct the appraisals. To complete the appraisals, Campbell relied on information related to production and revenue that the production companies provided to the Texas Railroad Commission and to the comptroller, as well as information related to operating expenses that the production companies provided to him.

*2 Appellees filed petitions with the Appraisal Review Board that challenged both level of the appraisals and the exclusion of "Category G property: Oil and Gas, Mineral, and other subsurface interests" from the appraisal records. Appellees stated in the petitions that the level of appraisals for mineral interests in Scurry County between 2012 and 2018 were "erroneous, inconsistent, and insufficient" and that "property was erroneously and incorrectly omitted (in toto and ab initio) from appraisal."

The Appraisal Review Board held a hearing on Appellees' challenges on June 21, 2018. At the hearing, Appellees indicated that they were not requesting "a complete reappraisal of all of the mineral interests in Scurry County." Rather, Appellees requested, pursuant to Sections 41.03(a)(2) and 25.21 of the Tax Code, "a reappraisal for the 2018 tax

year and back appraisal for the prior five years, which would be 2013–2017, only for [Appellants.]"

Appellees represented to the Appraisal Review Board that they hired a commercial appraiser to appraise the value of the mineral interests of the three "top producers" in Scurry County, which included Appellants. Appellees' appraiser obtained information on production and revenue from public filings made by these entities and used that information to appraise the value of the mineral interests using the method adopted by the comptroller. As to Appellants, the appraiser relied on information from public filings made by Appellants with the Securities and Exchange Commission (SEC), the Energy Commission, the Railroad Commission, and the comptroller and from information provided by Appellants to shareholders. According to Appellees, there was "not a very wide variance" in values between the appraisals done by Pickett and the appraisals done by Appellees' expert for the mineral interests of the production companies other than Appellants. However, Appellees' appraiser found a "huge variance" between his appraisal and Pickett's appraisal of the value of Appellants' mineral interests. Appellees estimated that, between 2012 and 2018, the value of Appellants' mineral interests in Scurry County was $14 billion more than the value set by the Appraisal District and that Appellants owed more than $283 million in unpaid taxes.

Campbell, the appraiser for Pickett that appraised Appellants' mineral interests, testified about his experience appraising mineral interests, the comptroller's audits of his appraisals, and the level of consistency between specific appraisals conducted by Campbell and the comptroller or Campbell and another appraiser. He also testified about relative expenses related to different levels of oil recovery, stating that tertiary recovery was the most expensive and that Appellants' oil production in Scurry County was tertiary recovery. Campbell testified that, in his opinion, an appraisal based on information from public sources without any knowledge of the actual rate of decline in production and the actual expenses of production could "badly overstate the value" of the mineral interests.

Appellees' attorney complained that Appellants and the Appraisal District had refused to produce the information that Appellants had provided to Campbell in the appraisal process and that, without the underlying data used by Campbell, it was impossible to determine the reason for the variance between the appraisals by Campbell and by Appellees' appraiser. To explain the variance, Appellees' counsel raised before the Appraisal Review Board the possibility of a misrepresentation by the taxpayer, a misunderstanding between Appellants and Pickett or between Pickett and the Appraisal District, an error in the estimated life of production, or the use of an incorrect discount rate. The Appraisal District's attorney argued that the Appraisal Review Board could "reach" appraisals prior to 2018 only if it found fraud by Appellants and that there had been no evidence of any fraud.

*3 The Appraisal Review Board denied Appellees' challenges to the appraisal roll, and on August 23, 2018, Appellees filed a petition for review and writ of mandamus in the trial court. Appellees asserted that the trial court had jurisdiction to perform a de novo review of the value of Appellants' mineral interests, "to fix the correct values," and to require the Appraisal District to reappraise and back-appraise the mineral interests.

In their petition, Appellees cited *Atascosa County v. Atascosa County Appraisal District*, 990 S.W.2d 255 (Tex. 1999); *In re ExxonMobil Corp.*, 153 S.W.3d 605 (Tex. App.—Amarillo 2004, orig. proceeding [mand. denied]); *Beck & Masten Pontiac-GMC, Inc. v. Harris County Appraisal District*, 830 S.W.2d 291 (Tex. App.—Houston [14th Dist.] 1992, writ denied); and Chapters 25 and 41 of the Tax Code. However, the only facts pleaded by Appellees were that Appellants' "mineral interest real property" in Scurry County "was erroneously and incorrectly omitted from appraisal for years 2018, and 2013-2017," that Appellees timely filed challenge petitions, that the Appraisal Review Board denied the petitions, and that Appellees timely sought de novo review. Appellees requested that the trial court either set the value of Appellants' mineral interests or require the Appraisal District to reappraise the "omitted (*in toto* or *ab initio*)" mineral interests for the year 2018 and back-appraise the interest for years 2013 through 2017. In their prayer for relief, Appellants requested that the trial court:

a. fix the accurate and correct appraised values of the mineral interest real property at issue in accordance with the requirements of law;

b. issue a writ of mandamus requiring the Scurry County Appraisal District and Chief Appraiser to immediately re-appraise the mineral interest real property at issue for 2018 and back-appraise the mineral interest real property at issue for years 2013-2017;

c. enter other orders necessary to preserve rights protected by and imposed duties required by the law;

d. award costs of court; and

e. and [sic] such further and other relief, whether at law or in equity, to which [Appellees] show themselves justly entitled.

Appellants were served with the original petition on August 29, 2018. They filed an answer to the original petition on September 24, 2018. Appellants did not file special exceptions to the original petition. On October 9, 2018, Appellants filed a motion to dismiss pursuant to Rule 91a of the Texas Rules of Civil Procedure in which Appellants asserted that Appellees failed to plead a claim that had a basis in law or in fact. Appellants specifically complained that Appellees failed to allege what assets were omitted from appraisal, who was responsible for the error, the factual basis for Appellees' conclusion that property was excluded in any tax year, or what "error" led to the exclusion.

Appellees filed a first amended petition on October 25, 2018. Appellees clarified that they were asserting a claim only under Section 41.03(a)(2) of the Tax Code based on the exclusion of property from the appraisal roll. Appellees alleged that the Appraisal District hired Pickett to appraise the value of mineral interests in Scurry County, the appraisal was done with the use of a formula mandated by the comptroller, and Pickett relied upon information provided by Appellants when it performed the appraisal; that Appellees conducted an appraisal using the same method as Pickett based on information found in Appellants' public filings; and that a comparison of the two appraisals reflected "a variance or omission/exclusion of $14.147 billion in property values for years 2013-2018." Appellees alleged that the variance and the inclusions of improper expenses of Appellants indicated "omissions and exclusions, *in toto* and/or *ab initio*."

*4 Appellees requested that, pursuant to Section 41.03(a)(2) of the Tax Code, the trial court conduct a de novo review of "the insufficient values" of Appellants' mineral interests and that, pursuant to Section 25.21 of the Tax Code, the trial court grant mandamus relief that required the Appraisal District to reappraise and back-appraise Appellants' mineral interests. In their prayer, Appellees requested the same relief as in the original petition.

On November 13, 2018, Appellees filed a second amended petition that contained additional allegations. Appellees alleged that mineral interests of Appellants in Scurry County were "excluded and omitted, *in toto* and/or *ab initio*, from appraisal for years 2018 and 2013-2017" and that the trial court should determine complete and accurate values pursuant to Sections 41.03(a)(2) and 42.24 of the Tax Code. Appellees alleged that "Section 41.03(a)(2) does not require proof or an appearance of fraud, but the appearance of fraud does constitute adequate evidence of omissions *ab initio*." Based on Appellants' refusal to produce documents and the review by experts of Appellants' federal and state filings, Appellees alleged that Appellants knowingly and purposefully provided inaccurate or incomplete information to be relied upon by Pickett in an effort to evade payment of taxes, that Appellants intended that Pickett rely on the misrepresentations, that Pickett did rely upon the misrepresentations, and that the misrepresentations were designed to avoid payment of ad valorem taxes that should have been paid. Appellees sought the same relief in the second amended petition as they sought in the original and first amended petitions and also requested to be allowed "discovery of the information and documents basis" of Pickett's and the Appraisal Review Board's valuations of Appellants' mineral interests.

Appellants withdrew their Rule 91a motion to dismiss and, on December 17, 2018, filed a motion to dismiss pursuant to the TCPA. Appellants asserted that the "claim of taxpayer fraud" in Appellees' second amended petition implicated Appellants' right to speak freely and participate in government for ad valorem tax purposes. Appellants argued that the TCPA motion was timely because Appellees did not allege that the omission of property from the appraisal roll was due to Appellants' fraud until the second amended petition, which, according to Appellants, was therefore the "legal action" that started the TCPA timeline. In the alternative, Appellants asserted that there was good cause for the trial court to extend the time to file the motion to dismiss because the "fraud allegation" had "only just recently appeared."

Appellees objected to the TCPA motion to dismiss as untimely. Appellees contended that the original petition provided Appellants with adequate notice of Appellees' claims and, therefore, triggered the sixty-day time period for a TCPA motion to dismiss to be filed.

In a letter to the parties, the trial court found that Appellants' motion to dismiss was untimely because the only exercise of free speech relied upon by Appellants was their "rendition and valuation of mineral properties for ad valorem tax purposes," which "has been at issue since [Appellees'] initiation of these proceedings." The trial court also determined that there was

not good cause to extend the time to file the motion. On March 8, 2019, the trial court signed an order that sustained Appellees' objection and denied Appellants' TCPA motion to dismiss because it was untimely.

Analysis

*5 [1] [2] In their first issue, Appellants contend that the trial court erred when it determined that the TCPA motion to dismiss was not timely. We review de novo a trial court's ruling on a motion to dismiss. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Jordan v. Hall*, 510 S.W.3d 194, 197–98 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (applying de novo standard of review to trial court's determination that TCPA motion was untimely). "In conducting this review, we consider the pleadings and the supporting evidence in the light most favorable to the nonmovant." *ETC Tex. Pipeline, Ltd. v. Addison Exploration & Dev., LLC*, 582 S.W.3d 823, 832 (Tex. App.—Eastland 2019, pet. filed); *see also Jordan*, 510 S.W.3d at 197.

[3] A party triggers the TCPA's dismissal procedure by filing a motion to dismiss. CIV. PRAC. & REM. §§ 27.003(a), .005(b); *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). The TCPA requires that the motion be filed no later than the sixtieth day after the date of service of the "legal action." CIV. PRAC. & REM. § 27.003(a). A party who fails to timely file a TCPA motion to dismiss forfeits the protections of the statute. *ETC Tex. Pipeline*, 582 S.W.3d at 833. The trial court, however, may extend the time to file a motion to dismiss on a showing of good cause. CIV. PRAC. & REM. § 27.003(b).

Appellants do not dispute that the original petition was a "legal action" as defined by the TCPA, *see* CIV. PRAC. & REM. § 27.001(6) (defining "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief"), or that they filed the motion to dismiss more than sixty days after they were served with the original petition. Rather, Appellants contend that Appellees' second amended petition alleged a new "legal action" that "reset" the statutory time period for filing the motion to dismiss.

[4] [5] An amended pleading that does not add new parties or claims does not restart the deadline for filing a TCPA motion to dismiss, but an amended petition asserting claims based upon new factual allegations may reset a TCPA deadline as to the newly added substance. *ETC Tex. Pipeline*, 582 S.W.3d at 833. However, additional factual details in an amended petition "do not restart the time for filing a motion to dismiss if the same essential factual allegations as to the claim were presented in an earlier petition." *Id.* Likewise, asserting claims in an amended petition that are a "subset" of the claims in the original petition does not reset the deadline to file a TCPA motion to dismiss. *Jordan*, 510 S.W.3d at 198–99; *see also Maldonado v. Franklin*, No. 04-18-00819-CV, 2019 WL 4739438, at *4 (Tex. App.—San Antonio Sept. 30, 2019, no pet. h.) (mem. op.).

[6] Appellees sought the same relief against the same parties based on the same statutory provisions in both the original petition and the second amended petition. Therefore, to determine whether Appellees essentially asserted a new "legal action" in the second amended petition, we must consider the nature of the claim that was pleaded in each petition.[2]

*6 [7] [8] [9] Pleadings are intended to give the other side notice of the party's claims and defenses, as well as notice of the relief sought. *Perez v. Briercroft Serv. Corp.*, 809 S.W.2d 216, 218 (Tex. 1991). "Texas follows a 'fair notice' standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); *see also* TEX. R. CIV. P. 45, 47(a). The purpose of this rule is to give the opposing party information sufficient to prepare a defense. *Auld*, 34 S.W.3d at 897 (quoting *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)).

[10] [11] [12] "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim." *Id.* at 897 (quoting *Roark*, 633 S.W.2d at 810). However, the "fair notice" standard does not require a plaintiff to "set out in his pleadings the evidence upon which he relies to establish his asserted cause of action." *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 494–95 (Tex. 1988). "Even the omission of an element is not fatal if the cause of action 'may be reasonably inferred from what is specifically stated.' " *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (orig. proceeding) (quoting *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993)).

[13] When no special exceptions are filed, we must "construe the pleadings liberally in favor of the pleader." *Auld*, 34

S.W.3d at 897. However, this "liberal construction" does not require us "to read into a petition what is plainly not there." *Bos v. Smith*, 556 S.W.3d 293, 306 (Tex. 2018) (quoting *Heritage Gulf Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 658 (Tex. App.—Houston [14th Dist.] 2013, no pet.)).

In *Lipsky*, the supreme court considered the application of the "fair notice" standard of pleading in the context of a TCPA motion to dismiss. 460 S.W.3d at 590–91. If the TCPA applies to a legal action, the nonmovant is required to establish by clear and specific evidence a prima facie case of each essential element of a claim in order to survive dismissal. CIV. PRAC. & REM. § 27.005(c). To determine whether the nonmovant met this standard, the trial court is required to consider the pleadings as well as supporting and opposing affidavits stating the facts on which the liability is based. *Id.* § 27.006(a). "[P]leadings that might suffice in a case that does not implicate the TCPA may not be sufficient to satisfy the TCPA's 'clear and specific evidence' requirement." *In re Lipsky*, 460 S.W.3d at 590. Therefore, "mere notice pleading —that is, general allegations that merely recite the elements of a cause of action—will not suffice. Instead, a plaintiff must provide enough detail to show the factual basis for its claim." *Id.* at 590–91.

[14] *Lipsky* stands for the proposition that a pleading that provides "fair notice" of a claim might not contain enough factual detail to constitute "clear and specific evidence" of a prima facie case under the TCPA. *See id.*; *see also Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017) (per curiam) ("Under the [TCPA], more than mere notice pleading is required to establish a plaintiff's prima facie case."). The supreme court did not address in *Lipsky* whether a pleading that meets the "fair notice" standard is sufficient to trigger the statutory sixty-day period for filing a TCPA motion to dismiss. Further, other than when a nonmovant relies on its pleading as clear and specific evidence of a prima facie case of each essential element of a claim, the statute does not impose a heightened pleading requirement. Therefore, we hold that the "fair notice" standard controls our analysis of whether Appellees asserted a new "legal action" in the second amended petition that was not asserted in the original petition. *See Fawcett v. Rogers*, 492 S.W.3d 18, 26 (Tex. App. —Houston [1st Dist.] 2016, no pet.) (applying "fair notice" standard in appeal of trial court's denial of TCPA motion to dismiss to conclude that petition sufficiently put defendants on notice that plaintiff was asserting a defamation per se claim).

*7 In their original petition, Appellees alleged that mineral interests of Appellants in Scurry County had been "erroneously and incorrectly omitted from appraisal" for the years 2013 through 2018. Appellees sought de novo review by the trial court of the value of Appellants' mineral interests in Scurry County. Appellees also requested a writ of mandamus compelling the Appraisal District to reappraise and back-appraise "the omitted (*in toto* or *ab initio*) mineral interest" of Appellants. Appellants referenced cases dealing with the omission of property from the appraisal roll, as well as Chapters 25 and 41 of the Tax Code. Therefore, to determine the nature of the claims asserted in Appellees' original petition, we must consider the comprehensive statutory scheme in Chapters 25 and 41 of the Tax Code that underlies Appellees' claims. *See Jim Wells Cty. v. El Paso Prod. Oil & Gas Co.*, 189 S.W.3d 861, 871 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (describing Tax Code as "a classic example of a 'pervasive regulatory scheme' ").

[15] "An 'ad valorem' tax is a tax on property at a certain rate based on the property's value." *Id.* at 870. The basis for the amount of ad valorem tax owed is the appraised value of the property. *Id.* County-based appraisal districts and appraisal review boards are responsible for the appraisal of real property for ad valorem tax purposes. *City of Austin v. Travis Cent. Appraisal Dist.*, 506 S.W.3d 607, 613 (Tex. App.—Austin 2016, no pet.); *see also* TAX § 6.01(b) (West 2015) (stating that each appraisal district "is responsible for appraising property in the district for ad valorem tax purposes of each taxing unit that imposes ad valorem taxes on property in the district").

"[E]xcept for certain specifically circumscribed rights," the Tax Code's comprehensive legislative scheme generally excludes taxing units, such as Appellees, from the appraisal process. *City of Austin*, 506 S.W.3d at 613–14; (quoting *Jim Wells Cty.*, 189 S.W.3d at 871). However, pursuant to Chapter 41 of the Tax Code, a taxing unit may challenge certain actions by its local appraisal district. *See* TAX §§ 41.03–.07. As relevant here, a taxing unit may challenge "an exclusion of property from the appraisal records." *See id.* § 41.03(a)(2).

The taxing unit initiates the challenge by timely filing a petition with the appraisal review board, *see id.* § 41.04, which conducts a hearing on the petition, *see id.* § 41.05, determines the challenge, and makes its decision by written order, *see id.* § 41.07(a). If the appraisal review board denies the challenge, the taxing unit may appeal to the district court

within sixty days of the appraisal review board's order. *Id.* § 42.031(a) (right of appeal by taxing unit), § 42.21 (petition for review). The trial court conducts a de novo review of the challenge and must "try all issues of fact and law raised by the pleadings in the manner applicable to civil suits generally." *Id.* § 42.23(a) (West Supp. 2018). Following the de novo review, the trial court may, among other remedies, "fix the appraised value of property in accordance with the requirements of law" and "enter other orders necessary to preserve rights protected by and impose duties required by law." *Id.* § 42.24(1), (3).

[16] Section 25.21 of the Tax Code requires the chief appraiser of a county who discovers that real property was omitted from an appraisal roll in any one of the five preceding years to "appraise the property as of January 1 of each year that it was omitted and enter the property and its appraised value in the appraisal records." *Id.* § 25.21(a); *see also Brennan v. City of Willow Park*, 376 S.W.3d 910, 918 (Tex. App.—Fort Worth 2012, pet. denied) (noting that remedy provided by Section 25.21 is the entry of "the *property* and its appraised value in the appraisal records"). Omitted property includes property that has been improperly exempted from the tax roll, *Atascosa Cty.*, 990 S.W.2d at 259, and property undervalued due to taxpayer fraud, *In re ExxonMobil*, 153 S.W.3d at 613; *Beck & Masten Pontiac-GMC*, 830 S.W.2d at 295 ("As a result of the fraud perpetrated by appellant's agent, the initial assessment by appellees was void *ab initio*."); *see also Willacy Cty. Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 50 (Tex. 2018) (quoting *Beck & Masten Pontiac-GMC*, 830 S.W.2d at 295 n.3, for proposition that Section 25.21 of the Tax Code "provides a remedy for an erroneous appraisal based on property that escaped taxation because of a void assessment arising from taxpayer fraud").

*8 [17] [18] An appraisal district and its chief appraiser have a "nondiscretionary duty" to back-appraise property that has been erroneously omitted from the appraisal roll. *Atascosa Cty.*, 990 S.W.2d at 259. Further, a taxing unit has standing under Chapter 41 of the Tax Code "to challenge the appraisal district's and chief appraiser's failure to back-appraise" improperly excluded property. *Id.* A district court has the power to issue writs of mandamus to compel public officials to perform ministerial duties. *Brennan*, 376 S.W.3d at 926–27 (citing TEX. CONST. art. V, § 8; *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 775 (Tex. 1999) (orig. proceeding)) (concluding that district court had jurisdiction over taxpayer's request for mandamus relief to require chief appraiser and members of appraisal review board to void assessments on property).

[19] Appellees alleged in the original petition that Appellants' mineral interests had been erroneously and incorrectly omitted from the appraisal roll and cited to Chapters 25 and 41 of the Tax Code. Pursuant to Chapter 25 and the case law that has interpreted that statute, real property is deemed omitted from the appraisal roll if it was not included on the roll, was improperly exempted from the roll, or was undervalued on the roll due to taxpayer fraud. Appellees' broadly worded original petition, construed liberally, encompassed the omission of Appellants' mineral interests from the appraisal roll based on all of these theories. As noted previously, Appellants did not file special exceptions requesting that Appellees be required to plead with greater specificity.

In the second amended petition, Appellees specifically pleaded for the first time that mineral interests of Appellants in Scurry County were omitted from the appraisal roll due to fraudulent misrepresentations by Appellants. Appellees, however, did not assert an independent common law fraud claim against Appellants. Rather, pursuant to Chapters 25 and 41 of the Tax Code, Appellees alleged that Appellants' mineral interests were undervalued due to fraudulent misrepresentations by Appellants and, therefore, omitted from the appraisal roll. This specific allegation was a subset of the broad allegations asserted in the original petition. Further, the more detailed factual allegations in the second amended petition did not change the essential nature of Appellees' claims or the relief that Appellees sought.

On this record, we conclude that the original petition gave fair notice to Appellants that Appellees claimed that mineral interests of Appellants in Scurry County had been omitted from the appraisal roll and that the second amended petition simply refined and narrowed the original claim. The notice provided by Appellees' original petition included notice to Appellants that their communications with the Appraisal District, as well as Appellants' participation in government for ad valorem tax purposes, were the subject of Appellees' original petition. Therefore, the second amended petition did not reset the statutory time period for filing a TCPA motion to dismiss. *See Jordan*, 510 S.W.3d at 198–99 (concluding deadline for filing TCPA motion to dismiss was not reset by filing of supplemental petition when the factual allegation underlying both the original and supplemental petitions was the purported illegal placement of radio advertisement); *see also Mancilla v. Taxfree Shopping, Ltd.*, No. 05-18-00136-CV, 2018 WL 6850951, at *3 (Tex. App.—Dallas Nov. 16,

2018, no pet.) (mem. op.) ("[T]he filing of an amended pleading that does not alter the essential nature of an action does not restart the deadline."). Because Appellants did not file the motion to dismiss within sixty days of service of the original petition, the trial court did not err when it determined that the motion was untimely. We overrule Appellants' first issue.

*9 [20] [21] In their second issue, Appellants alternatively argue that, if the motion to dismiss was untimely, the trial court erred when it found that there was no good cause to extend the time to file the TCPA motion to dismiss. On a showing of good cause, the trial court may extend the time to file a motion to dismiss under the TCPA. CIV. PRAC. & REM. § 27.003(b). We review the trial court's decision to deny an extension of time to file the motion to dismiss for an abuse of discretion. *Campone v. Kline*, No. 03-16-00854-CV, 2018 WL 3652231, at *6 (Tex. App.—Austin Aug. 2, 2018, no pet.) (mem. op.); *see also* TEX. GOV'T CODE ANN. § 311.016(1) (West 2013) (Generally, the use of the word "may" in a statute "creates discretionary authority or grants permission or a power."). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

There is limited authority on what constitutes "good cause" to extend the time to file a TCPA motion to dismiss. *See Campone*, 2018 WL 3652231, at *6 (concluding, based on specific facts of case, that defendant failed to show good cause for not seeking dismissal within sixty days of being sued). However, in other contexts, the supreme court has held that "[g]ood cause is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference." *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam); *see also Morin v. Law Office of Kleinhans Gruber, PLLC*, No. 03-15-00174-CV, 2015 WL 4999045, at *3 (Tex. App.—Austin Aug. 21, 2015, no pet.) (mem. op.) (applying definition of "good cause" from *Wheeler* in context of movant's failure to timely set a TCPA motion to dismiss for hearing).

Appellants contend that they established good cause to extend the time to file the motion to dismiss "because of the early status of this case and the ever-evolving nature of [Appellees'] claims." Appellants assert that the focus of the good-cause analysis should depend on whether the motion was filed late in the case for purposes of delay or was simply an effort by the defendant to invoke the stated policy of the TCPA to provide a mechanism for the early dismissal of a meritless action that attacks the defendant's constitutional rights. Appellants specifically argue that their failure to timely file the TCPA motion was not intended to delay the proceedings because the Rule 91a motion to dismiss was the proper procedural vehicle to attack a petition that failed to articulate a claim with any basis in fact or law and because they timely sought dismissal under the TCPA after Appellees filed the second amended petition that alleged taxpayer fraud.

Appellants were served with the original petition on August 29, 2018. In the original petition, Appellees directed requests for disclosure and requests for production of documents to both Appellants and the Appraisal District. On October 9, 2018, Appellants filed a Rule 91a motion to dismiss. At some point, Appellants also filed a motion to stay discovery[3] as well as a plea to the trial court's jurisdiction.[4] Finally, Appellants filed the TCPA motion to dismiss on December 17, 2018, which stayed all discovery in the case. *See* CIV. PRAC. & REM. § 27.003(c). Appellants also opposed Appellees' request for limited discovery pursuant to Section 27.006(b). The trial court did not hold a hearing on Appellants' TCPA motion to dismiss until March 4, 2019, over six months after Appellants were served with the original petition.

*10 A litigant clearly has the right to make the litigation choices that it deems most appropriate, but those choices have consequences. In this case, Appellants chose to initially file a Rule 91a motion to dismiss and did not file a TCPA motion to dismiss within the statutory deadline. However, the dismissal procedure in Rule 91a "is in addition to, and does not supersede or affect, other procedures that authorize dismissal." TEX. R. CIV. P. 91a.9. Further, we are aware of no authority that precluded Appellants from simultaneously filing special exceptions to require Appellees to plead with greater specificity, filing a Rule 91a motion to dismiss, and filing a TCPA motion to dismiss. *See Lipper v. Haynes*, No. 01-19-00055-CV, 2019 WL 3558999, at *1 (Tex. App.—Houston [1st Dist.] Aug. 6, 2019, no pet.) (mem. op.) (considering appeal of order that denied hybrid motion to dismiss under TCPA and Rule 91a); *Montoya v. San Angelo Cmty. Med. Ctr.*, No. 03-16-00510-CV, 2018 WL 2437508, at *1 (Tex. App.—Austin May 31, 2018, pet. denied) (mem. op.) (considering appeal of order that granted motion to dismiss pursuant to Rule 91a and the TCPA). Appellants' intentional choice to proceed with serial motions, rather than expeditiously seeking all relief to which they might have been entitled, caused significant delay in the resolution of the case.

We stress that each case is different and must be evaluated on its own facts and that a decision to delay filing a TCPA motion to dismiss will not always preclude a finding of good cause under the statute. However, on this record, we hold that the trial court did not abuse its discretion when it determined that Appellants failed to establish good cause to extend the time to file the TCPA motion to dismiss. We overrule Appellants' second issue.

This Court's Ruling

We affirm the trial court's order denying Appellants' motion to dismiss.

Willson, J., not participating.

All Citations

--- S.W.3d ----, 2019 WL 5800308

Footnotes

5 Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

1 The Texas legislature amended the TCPA effective September 1, 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1–9, 12 (H.B. 2730) (to be codified at TEX. CIV. PRAC & REM CODE ANN. §§ 27.001, .003, .005–.007, .0075, .009–.010). Because the underlying lawsuit was filed prior to September 1, 2019, the law in effect before September 1 applies. *See id.* §§ 11–12. For convenience, all citations to the TCPA in this opinion are to the version of the statute prior to September 1, 2019. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961–64, amended by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500.

2 To support the arguments in their briefs, both parties rely on litigation brought by Appellees' counsel on behalf of another client against Appellants in Pecos County and against Pickett in Dallas County. We see nothing in the TCPA that would allow us, or the trial court, to consider claims outside this lawsuit in our determination of the nature of Appellants' claims in this lawsuit. *See* CIV. PRAC. & REM. § 27.006(a) ("In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based."). Therefore, we have not considered claims made in other litigation in our analysis.

3 Appellants' motion to stay discovery is not in the appellate record. However, Appellees' response to the motion was filed on November 13, 2018.

4 Appellants' plea to the jurisdiction is not in the appellate record. During the hearing on the TCPA motion to dismiss, the trial court stated that it had previously ruled on the plea.

End of Document

Big Fields Get Bigger

Successful track record of extending productive life of mature fields

KINDER MORGAN

Significant amounts of recoverable oil in place

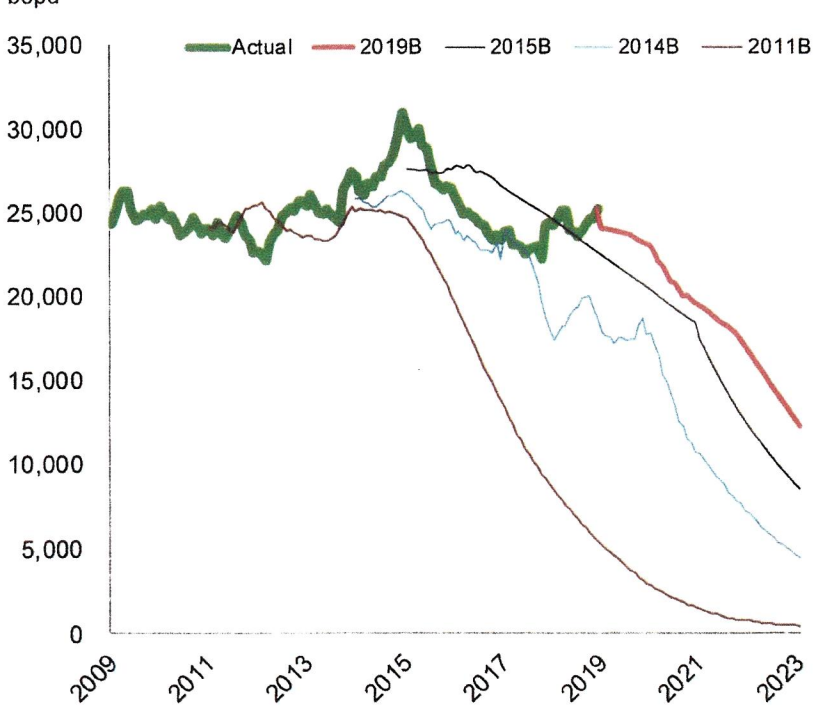
- SACROC – 2.8 billion barrels of original oil in place
  - Evaluating Transition Zone
  - Estimated incremental 700 mmbbls OOIP target
  - Delineation efforts ongoing
  - Executing two projects in 2019, East Flank and West Shore
- Yates – 5.0 billion barrels of original oil in place

Technical expertise will drive future success

- Long track record of expanding the field through advanced technology and new exploitation techniques
  - Advanced seismic reprocessing used to identify:
    - Future development projects
    - Zonal horizontal producers
    - Transition zone
  - Horizontal drilling technology
  - Conformance technologies and techniques:
    - Polymers
    - Mechanical

Exh. B

SACROC NET OIL PRODUCTION FORECASTS



Kinder Morgan 2019 Investor Day

Agenda and presenters

TIME	DISCUSSION	PRESENTER	
8:00 – 8:15	Compelling Investment Opportunity	**Rich Kinder** *Executive Chairman*	
8:15 – 9:15	Strategic Excellence	**Steve Kean** *CEO*	
9:15 – 9:45	Financial Excellence	**Kim Dang** *President*	
9:45 – 10:00	BREAK		
10:00 – 10:20	KMI: 2019 Budget	**David Michels** *VP & CFO*	
10:20 – 10:40	KML: 2019 Outlook & Budget	**Dax Sanders** *KML CFO* *KMI EVP & Chief Strategy Officer*	
10:40 – 11:30	Q&A		

KINDER MORGAN

2019 Investor Day

January 23, 2019

Seeking Alpha

Transcripts | Basic Materials

Kinder Morgan, Inc.'s (KMI) CEO Steve Kean on Q2 2019 Results - Earnings Call Transcript

Jul. 17, 2019 11:06 PM ET5 comments | 9 Likes
by: SA Transcripts

Q2: 07-17-19 Earnings Summary

Press Release SEC *10-Q* *Slides*

EPS of $0.22 misses by $-0.02 | Revenue of $3.21B (-6.24% Y/Y) misses by $-379.13M

Earning Call Audio Subscribers Only

0:00 / 1:05:10

Kinder Morgan, Inc. (NYSE:KMI) Q2 2019 Earnings Conference Call July 17, 2019 4:30 PM ET

Company Participants

Rich Kinder - Executive Chairman

Steve Kean - CEO

Kim Dang - President

David Michels - VP & CFO

Dax Sanders - EVP & CSO

John Schlosser - President, Terminals

Conference Call Participants

Jeremy Tonet - J.P. Morgan

Shneur Gershuni - UBS

Jean Ann Salisbury - Bernstein

Spiro Dounis - Credit Suisse

Exh. C

approximately 2%, primarily due to lower production at Katz and Goldsmith. While cotton production increased 8% versus the second quarter of 2018. But offset substantially below our plan.

The reservoir is processing slower than we expected and until we can determine how to address this issue starting to reduce 2019 capital expenditures associated with this asset. Largely as a result of this decision, free cash flow from our CO2 business has increased by approximately $80 million for 2019 as almost all the production associated with these investments benefited future years.

In CO2 as with all our assets we diligently monitor our investments to make sure that they're going to achieve our projected return. To the extent that we think there's a material risks with its return either take steps to mitigate our downside, or we do not move forward with those investments as we did here.

At SACROC which accounts for almost two-thirds of our current production, production was up 1% in the quarter, and we expect to be above budgeted volumes for the year. So nice current performance in SACROC. When you look at the longer term, the story has also improved. In our mid-year reserve review, SACROC proved reserves increased by about 5.5 million barrels, which represents approximately 33% increase improved reserves. This was driven primarily by increased recovery factors as a result of increased performance.

On our CO2 sales and transport business, it was up slightly in the quarter. And that was driven by an 11% increase in CO2 volumes, which more than offset a 4% decrease in the price.

With that, I'll turn it over to Dave Michels.

David Michels

Thanks, Kim. Today we are declaring a dividend of $0.25 per share, same as last quarter and in line with the budget, $1 per share for the fourth [Technical Difficulty] 25% increase over dividends 2018.

KMI's adjusted earnings in DCF grew from last year's second quarter [Technical Difficulty] generated DCF per share $0.50 two times or approximately $560 million in excess of the declared dividends.

Revenues were down 6% this quarter, compared to the second quarter in 2018. But a decline in cost of sales more than offset our lower revenues that our gross margin was up relative to the prior period. Some of that came from the benefit of non-cash losses on

Exhibit 10

Correspondence between Mr. Lemon
and Kinder Morgan counsel in this case

LAW OFFICE OF D. BRENT LEMON

Renaissance Tower
1201 Elm Street, Suite 4880
Dallas, Texas 75270
www.dblemon.com

Voice (214) 747-2277 Fax (214) 747-2280

August 22, 2018

Mark C. Rodriguez
Vinson & Elkins
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760

VIA EMAIL: mrodriguez@velaw.com

Re: Iraan-Sheffield Independent School District Board Member Harassment

Dear Mr. Rodriguez:

Kinder Morgan representatives have improperly harassed and interrogated the board members of Iraan-Sheffield Independent School District, my client.

The improper and wrongful attempts to obtain privileged information, intimidate, and tortuously interfere ***must cease immediately***.

Before 4:00 p.m. tomorrow, Thursday, August 23, 2018, you should disclose to me the names and titles of the Kinder Morgan representatives who have engaged in this conduct and taken these actions. You should also disclose any information, data, or documents retrieved from the board members of my client.

I will assume, for now, that you and your law firm did not know about this wrongful Enronesque conduct. As I recall, your firm paid $30 million for its failure to properly advise and control in the Enron matter.

Very truly yours,

D. Brent Lemon

D. Brent Lemon

DBL/kh
cc: Leslie Gardner, Via Email
James Leader, Via Email

Jones, Cameron

From: Brent Lemon <brent@dblemon.com>
Sent: Monday, December 3, 2018 11:54 AM
To: 'Jack Shepherd'
Cc: 'Jim Evans'; 'Harper Estes'; Leader, James
Subject: RE: Iraan-Sheffield ISD v. PCAD/Kinder Morgan

[EXTERNAL]

Jack,

The efforts of your client to delay and obstruct discovery as to its fraud have reached an Enronesque level.

There is currently no "dispositive" motion on file and there are absolutely no valid legal or factual basis for the future filing of such.

Likewise, a district court has previously ordered the production of the documents and information, and a prima facie showing of Kinder Morgan fraud has been made.

Please forward any reasonable revisions to the proposed Agreed Order of Confidentiality which I previously submitted to you.

It is time to move the cases along, and cut out the obstruction of justice.

Brent

D. Brent Lemon

Law Office of D. Brent Lemon
Renaissance Tower
1201 Elm Street, Suite 4880
Dallas, Texas 75270
Telephone: (214) 747-2277
Facsimile: (214) 747-2280
www.dblemon.com

From: Jack Shepherd [mailto:jshepherd@lcalawfirm.com]
Sent: Monday, December 03, 2018 10:12 AM
To: Brent Lemon
Cc: Jim Evans ; Harper Estes ; Leader, James
Subject: Re: Iraan-Sheffield ISD v. PCAD/Kinder Morgan

Brent—

We cannot agree to except the interrogatories you served late Friday afternoon from the agreed stay. These interrogatories were not on file at the time we made our proposal, and clearly concern the merits. Given the fact that our responses to the interrogatories are likely not going to be illuminating until dispositive motions are resolved (as you yourself noted), I do not understand the logic behind excepting them from the agreed stay.

As highlighted at the last hearing in the Scurry County matter, the point of the agreed stay is to streamline resolution of the defendants' procedural challenges to plaintiff's claims, without the burden of responding to voluminous merits-based discovery.

Please advise by 1:00 pm today as to whether you will agree to a stay of discovery as originally proposed by my letter from Friday morning.

Thank you,

B. Jack Shepherd
Lynch, Chappell & Alsup, PC
jshepherd@lcalawfirm.com

On Nov 30, 2018, at 5:04 PM, Brent Lemon <brent@dblemon.com> wrote:

> Jack,
>
> Interrogatories have been served on Kinder Morgan in this case.
>
> As you know, the Dallas District Court has previously ordered production of the information and documents at issue in this case, unlike the Scurry County matters. Additionally, there are no motions currently pending for which a stay should apply pending ruling, except for the obviously meritless but yet to be withdrawn Amended Rule 91a Motion.
>
> Nevertheless, I am generally agreeable to the terms of your proposed Rule 11 for this case, with the exception that Kinder Morgan will go ahead and file its objections and answers to the Interrogatories within 30 days. I expect Kinder Morgan to continue its game of delay and refuse to provide any substantive answers, but I want the clock to start running.
>
> Please prepare a proposed Agreed Order on Motion to Stay consistent with that in Scurry County and with the interrogatory exception listed above.
>
> Brent
>
> **D. Brent Lemon**
>
> **Law Office of D. Brent Lemon**
> Renaissance Tower
> 1201 Elm Street, Suite 4880
> Dallas, Texas 75270
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From: Jack Shepherd [mailto:jshepherd@lcalawfirm.com]
Sent: Friday, November 30, 2018 10:17 AM
To: Brent Lemon <brent@dblemon.com>
Cc: Jim Evans <jevans@lsejlaw.com>; Harper Estes <hestes@lcalawfirm.com>; Leader, James <jleader@velaw.com>
Subject: Iraan-Sheffield ISD v. PCAD/Kinder Morgan

Brent—

Please see the attached correspondence regarding the above referenced matter.

Regards,

B. Jack Shepherd
LYNCH, CHAPPELL & ALSUP PC | 300 N. Marienfeld, Suite 700, Midland, Texas 79701
MAIN 432.683.3351| DIRECT 432.688.1310 | FAX 432.688.1390 | EMAIL jshepherd@lcalawfirm.com | WEB www.lcalawfirm.com

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Jones, Cameron

From: Brent Lemon <brent@dblemon.com>
Sent: Friday, December 27, 2019 2:52 PM
To: Leader, James
Cc: Mason, Leslie; Popov, Chris; hestes@lcalawfirm.com; 'Kirk Swinney'; 'Jack Shepherd'
Subject: RE: Kinder Morgan Outstanding Discovery Responses/Answers Due 1/2/2020

[EXTERNAL]

James,

You again assert a very Enronesque position – continuation of a fraudulent scheme, unlawful evidence concealment, and obstruction of justice. *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 598-611 (S.D. Tex. 2002).

I suggest you simply read the statute relative to the termination of any tolling. Tex. Civ. Prac. & Rem. Code § 27.003(c) (suspended until the court has "ruled"). The Court ruled on December 2, 2019.

Please note that if Kinder Morgan has not produced the answers and responses to all of the outstanding written discovery on or before January 2, 2020, then I will seek court recognition of Kinder Morgan's complete waiver of all objections and the intentional violations of Rule 215.

You and your clients are on notice of the above.

Brent

D. Brent Lemon

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From: Leader, James [mailto:jleader@velaw.com]
Sent: Friday, December 27, 2019 12:09 PM
To: 'Brent Lemon' <brent@dblemon.com>
Cc: Mason, Leslie <lmason@velaw.com>; Popov, Chris <cpopov@velaw.com>; hestes@lcalawfirm.com; 'Kirk Swinney' <kswinney@lsejlaw.com>; 'Jack Shepherd' <jshepherd@lcalawfirm.com>
Subject: RE: Kinder Morgan Outstanding Discovery Responses/Answers Due 1/2/2020

Brent,

The discovery stay and tolling remain in effect until the earlier of the proposed order you submitted being signed by the Court or our motion being denied by operation of law. If you have authority to support your view to the contrary, I will review it. You also already have my position on the effectiveness of discovery served during a stay.

-JLL

James L. Leader, Jr.
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W +1.713.758.3242
Vinson & Elkins LLP
1001 Fannin Street
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Houston, TX 77002
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From: Brent Lemon <brent@dblemon.com>
Sent: Monday, December 23, 2019 4:25 PM
To: Leader, James <jleader@velaw.com>; 'Jack Shepherd' <jshepherd@lcalawfirm.com>
Cc: Mason, Leslie <lmason@velaw.com>; Popov, Chris <cpopov@velaw.com>; hestes@lcalawfirm.com; 'Kirk Swinney' <kswinney@lsejlaw.com>
Subject: Kinder Morgan Outstanding Discovery Responses/Answers Due 1/2/2020
Importance: High

[EXTERNAL]

Counselors,

On December 2, 2019, the District Court ruled on the TCPA Motion of Kinder Morgan.

As such, and to the extent the Motion had suspended any outstanding discovery, any tolling period ceased.

The Taxing Units have previously agreed to confidentiality of information and documents to be produced.

The following written discovery was previously served on Kinder Morgan:

Request for Disclosure – 09/12/19

First Request for Production – 09/12/19

Second Request for Production – 11/01/19

First Set of Interrogatories – 10/18/19

Full responses and answers to the written discovery are expected on or before January 2, 2020.

Thank you.

Brent

D. Brent Lemon

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Renaissance Tower
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NO. P-8133-83-CV

IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT	§	IN THE DISTRICT COURT
v.	§	83rd JUDICIAL DISTRICT
PECOS CO. APPRAISAL DISTRICT	§	
and	§	
KINDER MORGAN PRODUCTION CO., LLC, Individually and as Successor in Interest to KINDER MORGAN PRODUCTION CO., LP	§	PECOS COUNTY, TEXAS

PLAINTIFF'S EMERGENCY MOTION TO BIFURCATE HEARING ON KINDER MORGAN'S TCPA MOTION TO DISMISS

Comes Now Plaintiff Iraan-Sheffield Independent School District ("ISISD") and files this Emergency Motion to Bifurcate Hearing on Kinder Morgan's TCPA Motion to Dismiss and in support thereof would respectfully show unto this Court the following:

I. BIFURCATION IS APPROPRIATE

Plaintiff seeks a bifurcation of the hearing on Kinder Morgan's TCPA Motion to Dismiss. Specifically, the Plaintiff's Motion to Strike, Alternatively, For Limited Discovery should be heard and resolved first.

In the unlikely event the ISISD Motion to Strike is not granted then hearing on the second phase of the Kinder Morgan TCPA Motion to Dismiss should be scheduled to allow ISISD adequate time to complete any allowed limited discovery and to prepare and file a response seven (7) days before the second hearing.

Indeed, bifurcated consideration was previously ordered and/or agreed relative to the three previous Kinder Morgan TCPA motions, as doing so is the only reasonable, fair, and judicially economic manner to consider the issues.

There is no rational basis for Kinder Morgan to oppose such bifurcation unless there is an intent to harass counsel for ISISD and overwhelm the Court with multiple issues and huge filings.

A. Current Scheduling

On October 25, 2019, Kinder Morgan filed its appearance in this case, along with a Plea to the Jurisdiction. Kinder Morgan strategically filed its TCPA motion in this case on November 19, 2019, knowing the date opposing counsel was expecting his child to be born. Nevertheless, ISISD was forced to promptly file its Motion to Strike on November 20, 2019, and notice of the hearing on the Motion to Strike was sent on November 21, 2019 with the scheduled hearing of January 8, 2020. January 8, 2020 was the first available date on the Court's docket.

On December 2, 2019, the District Court in Scurry County granted the taxing units' Motion to Strike the TCPA motion of Kinder Morgan. Notably, the parties had agreed to a bifurcation of the TCPA hearing, allowing the taxing units to present their objections to even the application of the TCPA to the issues and, in the alternative, to seek limited discovery. **(Exh. A)**